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Supreme Court of the United States

OCTOBER TERM, 1949

No. 197

GEORGE MARSHALL,

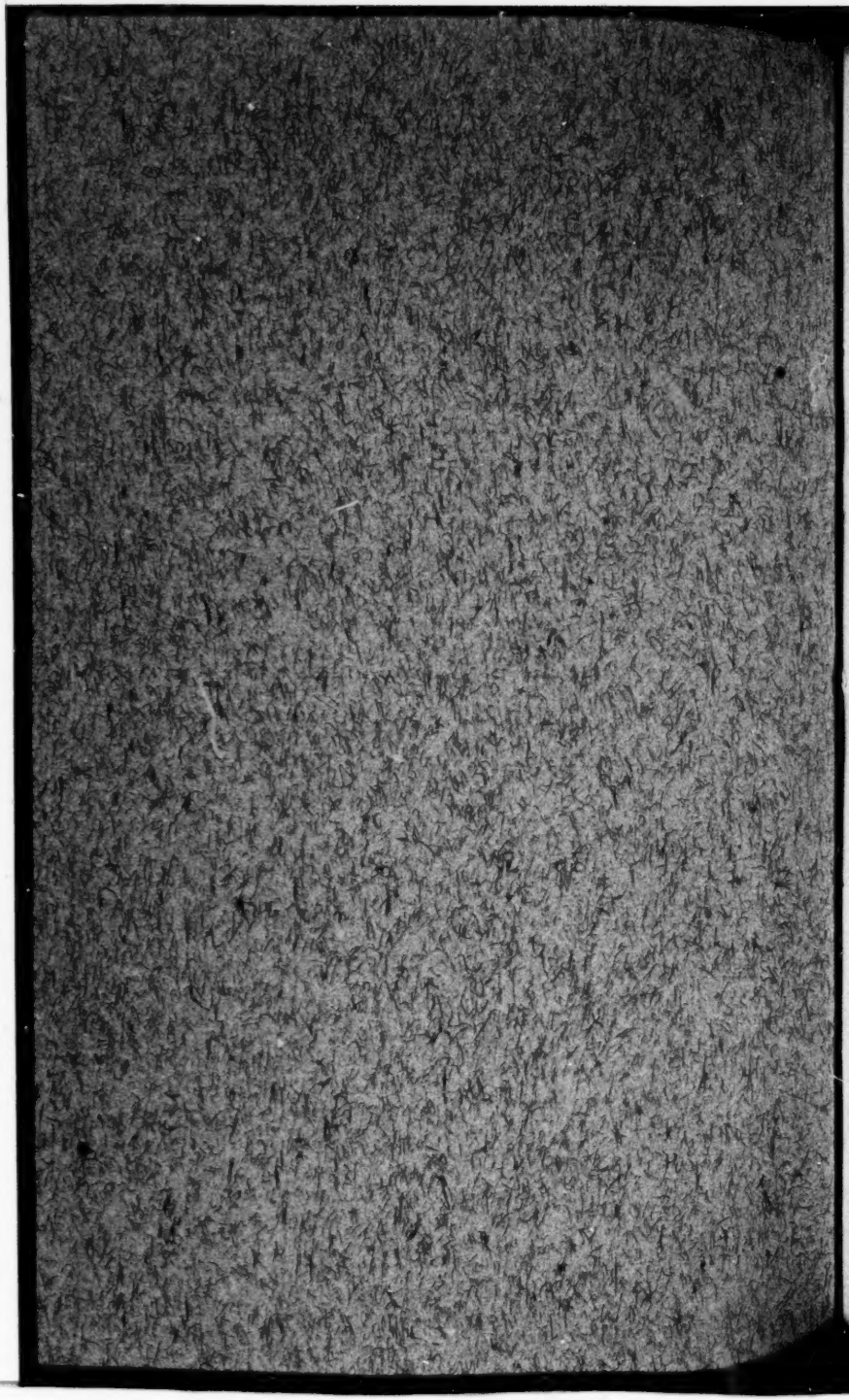
Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

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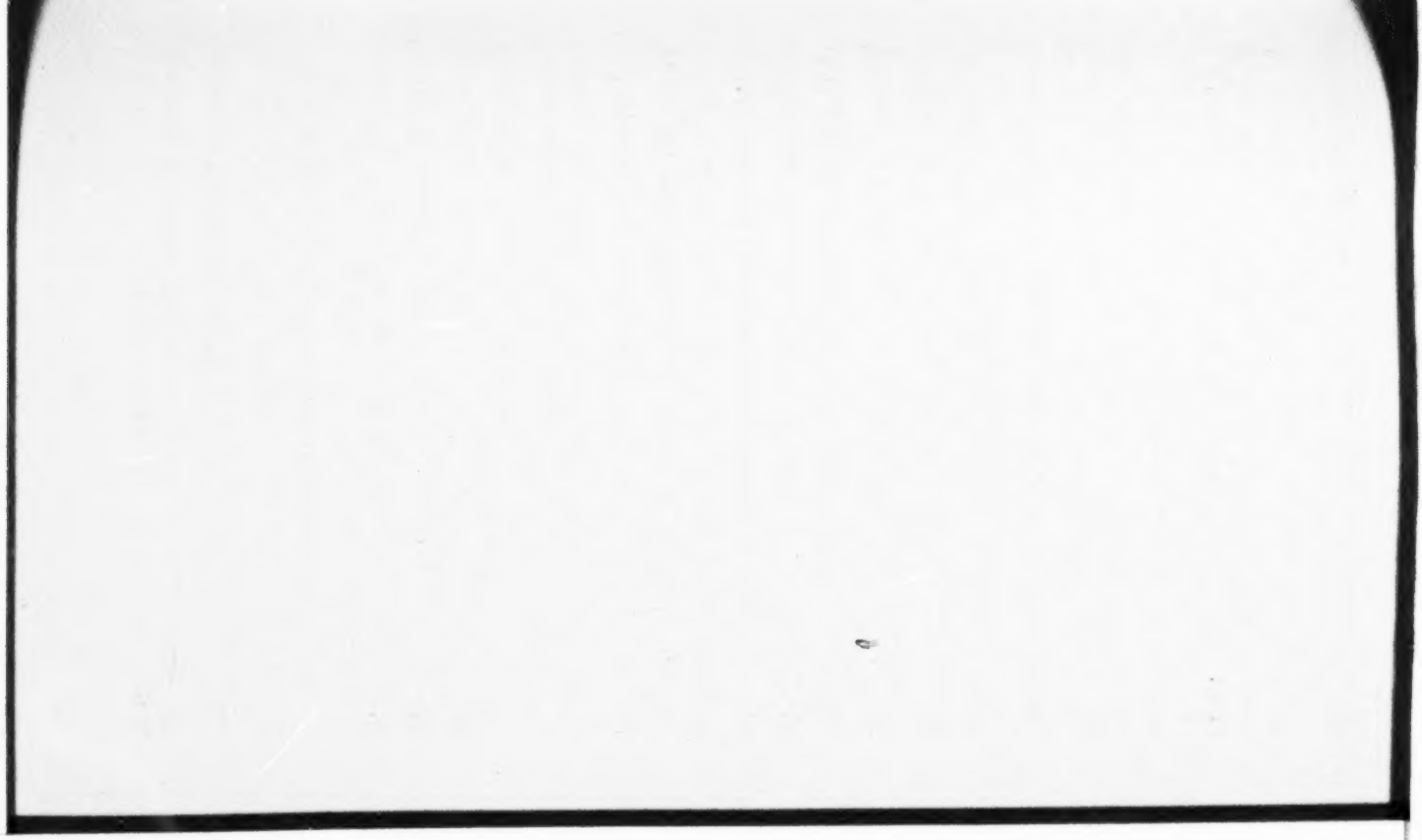
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Supreme Court of the United States

OCTOBER TERM, 1949

No.

GEORGE MARSHALL,

Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

This is an application for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the District Court of the United States for the District of Columbia convicting petitioner of a violation of Title 2, § 192 of the United States Code.

The Opinion Below

The opinion of the Court of Appeals was written by Judge Sweeney. It has not yet been officially reported.

Summary Statement

This appeal presents some important constitutional problems arising out of the issuance of subpoenas by the Un-American Activities Committee of the House of Repre-

sentatives (which we shall hereafter call the Committee) different from any heretofore presented to this Court.

Petitioner was subpoenaed as Chairman of the National Federation of Constitutional Liberties (which we shall hereafter call the Federation) to produce records of that organization relating to the solicitation and disbursement of funds with a list of all contributors (Govt.'s Ex. 1, R. 144).

The indictment, so far as relevant on this appeal, charged petitioner with wilfully having refused to produce these records (R. 2, 3).

The activities of the Federation are described in a statement (Deft.'s Ex. 14, R. 200-209) which petitioner submitted to the Committee when he first appeared in New York:

> "The activities of the NFCL have always been public in character. They consist principally of the preparation and distribution of publications in the field of civil rights, protection of the rights of labor, analysis of legislation, development and support of legislative programs, public campaigns including campaigns against discrimination and native fascists, campaigns to extend the franchise, and campaigns to aid the victims of oppression. These campaigns are frequently implemented by Action Letters, testimony before legislative committees, briefs filed in court, public statements, by organizing meetings and delegations to petition the government, and by participating in public conferences" (R. 201).

The same statement set forth the objections of petitioner and the Federation to the production of the records called for by the subpoena:

> "The House Un-American Committee, in its demands upon the Federation, exceeds whatever power Congress may have given it, serves no legislative purpose, and violates the Federation's rights guaranteed by the First Amendment to the United States Constitution. By its sweeping requests for production of books and records, lists of contributors, etc., it indulges in a mis-

use of the Congressional subpoena power, and thus violates the protection guaranteed to the Federation by the Fourth Amendment to the Constitution. The Un-American Committee seeks to have the Federation yield to its demands to be permitted to engage in a fishing expedition into the Federation's files and records. The end result will not be the discovery of any un-American or subversive propaganda, but rather that the names of good Americans will be added to the notorious Dies Committee 'blacklist', that the Federation will be smeared, that its work will be hampered and interrupted, that its supporters will be browbeaten and harassed, and that the reactionary and fascist-minded press will be specially favored as it has been in the past with material for a Roman holiday of red-baiting against progressives and progressive action" (R. 204, 205).

But petitioner did not rely only on this challenge of the power of the Committee. He presented to it (R. 80, 82) a comprehensive cross section of the propaganda material distributed by the Federation, consisting of 43 separate items. These were listed in the statement (R. 206-209) under the following headings:

1. The right to vote.
2. Equal rights to work and to use of public facilities.
3. Defense of Negroes against mistreatment.
4. Defense of rights of labor.
5. Democracy in education.
6. Democracy in the Armed Forces.
7. The danger of native fascism in America.

All this material was received by the Committee (R. 80, 81) and was put in evidence at the trial as Exhibit 13 (R. 80-82).

The contents of this material was described and analyzed at petitioner's request by Carl Swisher, Professor of Political Science at Johns Hopkins University (R. 99). His report was accepted by the Court below as an aid to it (R. 100). His conclusions are explicit to the effect that the

Federation propaganda material did not bring it within the scope of the Resolution under which the Committee was functioning.

It is in the light of the foregoing, which we shall later fully elaborate, that this Court must evaluate the rulings of the Court below on the crucial issue of pertinency and the other issues raised on this appeal.

Before trial petitioner, with certain others (see R. 14), moved to dismiss the indictment on the ground that the Resolution setting up the Committee was unconstitutional. This motion was denied in an opinion by Judge Holtzoff (R. 13-24).

On the examination of the talesmen a problem arose because a number of them were government employees. Counsel for petitioner suggested a question which called to their attention the current loyalty investigation of government employees and the connection of the Un-American Activities Committee both with that investigation and with the instant prosecution. On the basis of this relation counsel sought an inquiry whether a prospective juror might feel that his job would be affected were he to acquit (Q. G-18, R. 39). After some discussion the Court refused to allow the question to be put (R. 41). It also denied a motion to exclude all government workers from the panel (R. 39, 40). Two of the persons chosen to sit were such workers (R. 42), petitioner having exhausted all of his peremptory challenges (R. 42).

So far as is relevant on this application, the only testimony for the prosecution was that of Mr. Adamson, counsel for the Committee (R. 43), but a large quantity of exhibits was introduced on his cross-examination. Mr. Adamson testified that petitioner had first appeared before a Subcommittee in New York City (R. 43) and that on that occasion he produced publications issued by the Federation but no records (R. 45). He was then asked to appear in Washington at which time, according to Mr. Adamson, he said "that he would not produce the other records, that is,

the books, papers, books of account, record of monies received and expended" (R. 45).

Almost all of the remaining examination of this witness related to the pertinency of the material called for by the subpoena. This testimony was elicited in the absence of the jury (R. 47).

The Government expressly stated that it was relying to establish pertinency solely on an address given by Congressman Martin Dies before the Congress in September, 1942 (R. 102). Excerpts from this speech were read into the record (R. 49-65) and parts not so read into the record are printed as an exhibit (Gov. Ex. 6, R. 145-171). This speech was made by Mr. Dies in part in response to an attack upon himself by the Federation in a pamphlet which was marked Defendant's Exhibit 1.*

This pamphlet entitled "Investigate Martin Dies" consists of 48 pages. Petitioner signed the foreword which summarizes the material presented (Ex. 1, pp. 3, 4) as well as a letter of transmittal and a telegram addressed to Mr. William Power Maloney, then a special assistant to the Attorney General (Ex. 1, pp. 5-10). This letter requests a grand jury investigation of Mr. Dies on the ground that he had shielded many of the persons then (1942) recently indicted as seditionists. The first part, entitled "The Case against Martin Dies" (id. pp. 11-28) is documented by an analysis of the hearings and reports of the Dies Committee in so far as they dealt with many of these individuals, such as Winrod, Viereck, Pelley and others. The second part is a memorandum (id. pp. 29-48) showing how the Dies Committee had hindered the war effort of the United States.

It was in purported answer to this attack on him by the Federation that Mr. Dies rose to a point of "personal privilege" (R. 49) and made the speech in question. Actu-

* This exhibit was not printed in the Joint Appendix used in the Court of Appeals. It was submitted to that Court in the form in which it was originally printed—as were other exhibits listed in Appendix A of this petition. A set of these has been forwarded to this Court.

ally Mr. Dies did not answer the attack at all but launched into a counterattack on the Federation and other organizations, including also animadversions on the Attorney General (R. 146-148, 164, 169) the F. B. I. (R. 50), and Secretary Ickes (R. 168).

It will be noted that this speech was made three and a half years before the subpoena was issued and that the references to the Federation are based in part on an alleged confidential report made by the Attorney General, the date of which was never exactly determined although there is a suggestion that it was issued around September or October, 1941 (R. 77).

In considering the relevancy of the subpoena the Court should bear in mind that the Committee had, prior to its issuance, taken a position concerning the Federation in House Report No. 2233 (Ex. 17). This report, although dated after the issuance of the subpoena, was actually prepared some months earlier—in December, 1945 (R. 83). It referred to the Federation in a number of places (Ex. 17, pp. 15, 17, 32, 34, 36, 50, 61). One of the reasons for referring to it was its distributing a document first published by the Army and known as Fact Sheet No. 64; another was its circulation of a pamphlet giving advice to persons called before Congressional Committees. The Committee referred to the Federation as follows, under a heading:

> "Subversive Propaganda for Our Armed Forces"
> (Ex. 17, p. 14)
>
> "Although the Army appears to have ceased the publication and distribution of Fact Sheet No. 64, it seems that certain of our very numerous thought-control societies assumed the job of publishing this document and carrying on its distribution. One of these organizations is the National Federation for Constitutional Liberties, with offices in New York. Fact Sheet No. 64 is the basis for a pamphlet printed in colors and with full credit shown for the War Department. This is the same organization that published a pamphlet entitled 'Investigating Committees and Civil Rights,' which contains suggestions to per-

sons who are called to testify. Section 4 of this pamphlet is entitled 'Contempt of Congressional Investigating Committees'" (Ex. 17, p. 15).

Facts Sheet No. 64 is the basis of item No. 36 of Exhibit 13 in evidence (R. 84, 209). It was originally prepared by the Army and discusses native fascists, how to spot and stop them, and was introduced into the Congressional Record on April 30, 1945 by Rep. Sabath (Ex. 13, No. 36, unnumbered page 3).

The Committee's comments on this pamphlet are remarkable for their inaccuracy. Thus it says (Ex. 17, p. 14) that in this document "of Red poison" is the suggestion "that any native-born person who claims to be 100% American is either a Fascist or is likely to become one very shortly". And it says, further, "the last two pages are filled with material designed to transmit propaganda favorable to Communism and military dictatorship".

Actually, the last pages stress only the need for cooperation to preserve world peace and security "by making our democracy work". And the only mention of "100 percent American" is the statement that "The United States also has its native fascists who say that they are '100 percent American'". As to the paragraph about the Soviet Union quoted in the report (Ex. 17, p. 15), not a word of it appears in the reprint circulated by the Federation!

The other document referred to in the matter we have quoted from the report is Exhibit 18 (R. 85, 216-224). This is a serious and moderately formulated discussion of the legal problems confronting persons subpoenaed by legislative committees. That the Committee should have found it pertinent to comment on the distribution by the Federation of these documents and used the term "thought control" when so doing is a significant reflection on the Committee's attitude and mental processes.

The Committee, moreover, referred to several persons in this report because they had participated in some activity of the Federation. It listed (Ex. 17, p. 34) Rev. Fritchman for having signed a message opposing the Com-

mittee. This document (see R. 85, 116, 117) is Exhibit 19. Another instance is the listing (Ex. 17, pp. 35, 36) of one Kahn for his attendance at a meeting held by the Federation to protest anti-semitic activities (see Ex. 20, R. 224). The report quotes with evident disfavor Kahn's advocacy of equal justice for Jews and Negroes (Ex. 17, p. 35)!

At the trial petitioner contended that he had the right to establish that, in fact, the Federation was not engaged in any activities which brought it within the scope of the Committee's investigation, and in any event that he was entitled to submit to the Court all the material which the Committee had available to it when it issued the subpoena. To that end petitioner caused subpoenas to be issued both to the Clerk of the House (R. 26-31) and to the Attorney General (R. 31-36).

No formal response was made to the subpoena directed to the Clerk of the House, but the Court ruled irrelevant the crucial items demanded (R. 126). These were Nos. 7, 8, 27, 28, which called for material relating to petitioner's organization (cf. R. 126 and 27, 29).

In response to the subpoena directed to the Attorney General one Herbert Stearns employed in the Department of Justice appeared at the trial (R. 101). He testified that he had the first item which was the Attorney General's report, and also items 7, 8, 9, 11, 14, 15, 17, 18 and 19, but that he would not produce these documents because of instructions of the Department of Justice (R. 102). He said that all of the documents which he had were part of the confidential files of that Department. Objection was made to the receipt of the documents by counsel for the Government on the ground that they were irrelevant (R. 102) and the Court sustained the objection on that ground alone (R. 104).

On the cross-examination of Mr. Adamson on the issue of pertinency it appeared, however, that as counsel for the Committee on Un-American Activities, Mr. Adamson

had examined the pamphlet literature mentioned in the Attorney General's report, some of which had been produced by petitioner at the first hearing (R. 71).

Specifically the Committee had before it and had considered (R. 71) the following documents which were also referred to by the Attorney General in his report (the page references to the record following the exhibit numbers will indicate where Mr. Adamson testified to the above effect):

The call to a Conference on Constitutional Liberties issued in June, 1940, listing the proposed speakers at that conference (Ex. 2, R. 72).

Brochure describing the Federation, undated (Ex. 3, R. 73).

Pamphlet reprinted at pp. 172-175 on conscription and civil liberties (Ex. 4, R. 76).

Other documents and material issued by the Federation (in addition to the 43 documents submitted by petitioner in New York) were in the possession of the Committee. Some of these were received in evidence as illustrative of the Federation's work (R. 80), but the Court blocked counsel's effort to have it all introduced (R. 79 and see Point V). The material which is in evidence (Exs. 5-12, R. 175-191) included the following:

Action Letter opposing peacetime conscription (Ex. 5, R. 175-176).

Pamphlet "Witch Hunt 1941" (Ex. 6, R. 176-182).

Declaration, Bill of Rights Day (Ex. 8, R. 182, 183).

Pamphlet "Keeping Elections Free" (Ex. 9, R. 183-188).

Action Letter, supporting Anti-Poll Tax Bill (Ex. 11, R. 188-190).

Action Letter, urging cooperation with FEPC (Ex. 12, R. 190, 191).

All this material had previously been known to the Committee prior to the issuance of the subpoena (R. 92).

There was also introduced in evidence a statement made by petitioner at the time he appeared before the full Committee (R. 83, Ex. 16, reprinted at R. 214-216), a report

of the Committee on Un-American Activities (Ex. 17), extracts from a pamphlet entitled "Investigating Committees and Civil Rights" (Ex. 18, reprinted at pp. 216-223), which was referred to in that report of the Committee (R. 85), as also was (R. 85, 86) a publication called "A Message to the House of Representatives", being a petition signed by many representative Americans asking the abolition of the Committee (Ex. 19).

It is petitioner's contention, which has never been controverted, that all of the material produced clearly indicates that the activities of the Federation were of such a character as to exclude them completely from any legitimate concern of the Committee, that its activities were of a character entirely protected by the First Amendment, that no conceivable definition of the terms of the Resolution could cover them, even assuming, as we do not, that the Committee could constitutionally inquire into anything under the vague and uncertain terms there used.

Counsel for petitioner also sought to establish at the trial that the Committee on Un-American Activities was acting as a censor of propaganda with which it did not agree and was engaged in compiling a blacklist of organizations and individuals, including the Federation itself (R. 94, 95). Two offers of proof were made on this subject which were marked Exhibits 25 and 26 for Identification (R. 96) and are reprinted at pages 235-238—the reference on page 235 to Exhibit 35 is a typographical error. The Court ruled that these offers of proof were not relevant (R. 97).

Counsel then sought to show that the House Committee was guided by no definite or ascertainable standards, counsel precising certain evidence which he expected to bring forward in support of this contention (R. 105-117, 120). The Court before ruling on this last offer of proof prematurely ruled that it was relevant for the Committee to issue the subpoena (R. 120). Counsel also offered to prove by a witness that insofar as the Federation issued non-printed propaganda material, it was the same char-

acter as the printed material in evidence. The Court ruled that that would not be permissible (R. 121).

After a few other exhibits were offered which were rejected by the Court (R. 123-127), defense counsel offered to read to the jury the statements made by petitioner at the time he appeared in New York and Washington (Exs. 14, 16) in order to show that his refusal to produce the subpoenaed records was not wilful (R. 127). The Court refused to permit this to be done (R. 128).

In the motion to dismiss the indictment one of the grounds urged was that the subpoena directed to petitioner was void because of its unreasonable scope (R. 3). In denying that motion Judge Holtzoff ruled that the question was one of mixed law and fact and should not be determined except at the trial (R. 23). At the trial the Court overruled the objection to the subpoena (R. 120). This ground of attack on the indictment was expressly preserved by the renewal of the original motion at the end of the case (R. 128).

In addition counsel moved for an acquittal on the grounds that the Resolution was invalid, that the Government had not shown that the documents demanded by the subpoena were pertinent, and that there was insufficient evidence to go to the jury (R. 128). These motions were denied.

Certain exceptions were taken to the charge by the Court on the subject of wilfulness (R. 141) which will be referred to hereafter.

The Court of Appeals affirmed the conviction on the ground that the Committee was justified in investigating the Federation without in any way discussing the crucial issue whether the material called for was pertinent to the inquiry. It rested its decision on the ground that there might be "silent diffusion of subversive doctrine" without indicating how this contradiction in terms is possible or what basis there was for supposing that the Federation was engaged in any such activity. The record will be searched in vain for any suggestion that the Federation

was engaged in secret activities of any kind. Indeed, the entire discussion of this so-called secret activity came into the case for the first time in the opinion of the Court of Appeals. The case was not tried on any such theory.

Statement on Jurisdiction

The judgment of the Court of Appeals was entered on June 20, 1949. Jurisdiction is invoked under Judicial Code § 1254(a).

Statutes Involved

1. 2 U. S. C., § 192; R. S. § 103; June 22, 1938, c. 594, 52 Stat. 942.

Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. 2 U. S. C., § 194; R. S. § 104; July 13, 1936, c. 884, 49 Stat. 2041; June 22, 1938, c. 594, 52 Stat. 942.

Witnesses failing to testify or produce records. Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent

to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

3. Legislative Reorganization Act of 1946, 79-2, Public No. 601, ch. 753, section 121, establishing the House Committee as a standing committee of the House of Representatives and defining the powers and duties of that committee.

"Rule X

Standing Committees

(a) There shall be elected by the House at the commencement of each Congress, the following standing committees:

. . . 17. Committee on Un-American Activities, to consist of nine Members.

Rule XI

Powers and Duties of Committees

. . . (q)(1) Committee on Un-American Activities

(A) Un-American Activities.

(2) The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from

time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

The language in the amendment of Rule XI by the Legislative Reorganization Act of 1946 is substantially the same as the House Resolution which initiated and continued the House Committee in effect until the establishment of the present Committee (House Resolution 5, 79-1, 91 C. R. 10, 15 (1945); H. R. 282, 75-31, 83 C. R. 7568, 7586 (1938); H. R. 26, 76-1, 84 C. R. 1098, 1128 (1939); H. R. 321, 76-3, 86 C. R. 572, 605 (1940); H. R. 90, 77-1, 87 C. R. 886, 899 (1941); H. R. 420, 77-2, 88 C. R. 2282, 2297 (1942); H. R. 65, 78-1, 89 C. R. 795, 810 (1943)).

The Questions Presented

The following questions are presented:

1. Does the resolution authorizing the investigation by the Committee on Un-American Activities of the House of Representatives—on its face and as here applied—violate petitioner's constitutional rights of freedom of speech, press and assembly and, because of the vagueness of its terms, deny him due process?

2. Were the matters called for by the subpoena pertinent to any valid inquiry which the Committee was authorized to make?

3. Was the subpoena void as in violation of the Fourth Amendment because too broad?

4. Was it proper in this case to permit government employees to remain on the jury, particularly in view of the refusal of the Trial Court to permit a full inquiry as to their possible bias?

5. Should petitioner have been permitted to offer in evidence the material which he requested from the Clerk of the House of Representatives and the Attorney General?

6. Should petitioner's offer of proof with regard to the activities of the Committee have been accepted?

7. Was it error to refuse to charge, as requested by petitioner, that there could be no wilfulness in this case without wrongful intent?

Reasons for Granting the Writ

The writ should be granted because federal issues are involved which have not heretofore been and should be determined by this Court since they are of great public importance and the decision below contravenes principles established by decisions of this Court.

1. Whether the Resolution creating the Committee on Un-American Activities is unconstitutional because it abridges freedom of speech, of the press and of assembly and because of the vagueness of its terms has never been determined by this Court. Judge Clark of the Second Circuit dissenting in *United States* v. *Josephson*, 165 Fed. (2d) at p. 93 and Judge Edgerton of the District of Columbia District Court dissenting in *Barsky* v. *United States*, 167 Fed. (2d) at p. 252, have both expressed the opinion that this Resolution is unconstitutional on these grounds. In the case at bar these observations are even more pertinent because the effect of the subpoena in this case and the purpose of its issuance were to cripple the functioning of an organization devoted to the distribution of literature protected by the guarantees of the First Amendment by adversely publicizing the supporters of the organization. As thus applied the Resolution violates petitioner's constitutional rights.

The statement by the Court of Appeals that the rights guaranteed by the First Amendment are "subordinate to the greater rights of the general public interest" flouts repeated rulings of this Court. Cf. *Terminiello* v. *Chicago*, 337 U. S. ——.

2. It is settled by decisions of this Court that material may not be demanded by the subpoena of an investigating committee unless it is pertinent to the inquiry being conducted by that committee (*Sinclair* v. *United States*, 279 U. S. 263; Cf. *McGrain* v. *Daugherty*, 273 U. S. 135). Indeed, it has been stated that a subpoena which calls

for material which is not pertinent violates the Fourth Amendment (*Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209; Cf. *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298). The Court below, while paying lip service to the doctrines above stated, did not actually determine whether or not the material called for by the subpoena was relevant to the inquiry. Petitioner maintains that all of the material called for by the subpoena was protected by the First Amendment and did not come within the scope of the Resolution authorizing the inquiry. Petitioner maintains, moreover, that the issue of pertinency must be determined on the actual facts, not merely on the facts as they appeared to the Committee or on its reasonable belief concerning these facts. That question has never been passed on by this Court.

3. It is well settled by decisions of this Court that a subpoena which is too broad is void under the Fourth Amendment (*Hale* v. *Henkel,* 201 U. S. 43; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298). The subpoena here in question was unlimited either as to time or scope and was consequently unreasonable within the doctrine of these cases. The Court below gave no consideration to this question although it was properly presented to it.

4. While this Court has ruled that it is proper for government employees to sit as jurors in criminal cases being tried in the District of Columbia (*United States* v. *Wood,* 299 U. S. 123; *Frazier* v. *United States,* 335 U. S. 497), that issue has not been passed on in a case like the present. It will, however, be considered by the Court in *Dennis* v. *United States,* certiorari granted June 27, 1949. Because of the intimate relation between the Committee and the prosecution on the one hand and the Committee and the current loyalty investigations of government employees on the other, there is a strong probability that government employees could not actually be free from

bias. At the very least full inquiry should have been permitted to ascertain whether fear of loss of their job because of this relation might have affected such employees' ability to serve as jurors. The Trial Court refused to permit the submission of such a question to the jurors. This issue was also not considered by the Court of Appeals although properly presented to it.

5. Even on the theory adopted by the Trial Court that petitioner was limited in his proof to matters actually considered by the Committee, petitioner was prevented from showing the Court what that material actually consisted of and in that way was prevented from showing that the material called for by the subpoena was not relevant to the Committee's inquiry.

6. The Trial Court prevented petitioner from showing that the Committee was motivated to destroy the Federation because of its disagreement with views expressed by that organization and also from showing that its purpose in issuing the subpoena was to blacklist its supporters and thus destroy its effectiveness. By so doing the Trial Court not only prevented petitioner from showing that the material was not pertinent, but also prevented him from developing an effectual support for his constitutional arguments.

7. Whether or not the word "wilful" in this statute connotes more than deliberate action has not been definitely determined by this Court. Whatever may be the interpretation to be given to this word generally, different considerations obtain here because of the vagueness of the terms used in the Resolution creating the Committee. In order to save that Resolution from condemnation on the score of vagueness, the word "wilful" should have been interpreted as requested by petitioner in his request to charge, as was done by this Court in *Screws* v. *United States,* 325 U. S. 91.

POINT I

With respect to the constitutionality of the Resolution creating the Committee.

A. The Resolution on Its Face

This case in part presents the same issue which the Court had before it in *Eisler* v. *United States,* 337 U. S. ——, but did not decide because of Eisler's escape from the jurisdiction. It is an issue which is also awaiting decision in the *Barsky* case where certiorari was originally denied, 334 U. S. 843, and in which an application for rehearing has been pending undetermined for nearly a year. It is a question which will be presented to this Court in other cases now on application for certiorari. It is important and far-reaching.

On the general issue of unconstitutionality, under the First Amendment and the Fifth Amendment, of the Resolution on its face we can add little to the views expressed by Judge Edgerton in his dissent in *Barsky* v. *United States,* 167 F. 2d at 252, and by Judge Clark dissenting in *United States* v. *Josephson,* 165 F. 2d at 93. The views there expressed are, moreover, buttressed by the decision of this Court in *Winters* v. *New York,* 333 U. S. 507. There this Court stressed the necessity of a clear definition of terms where freedom of expression might be restricted because of the impact of uncertain terms. Surely the impact of the terms used in the Resolution here under consideration are bound to have an effect even more restrictive of freedom of expression than the words of the New York statute condemned by this Court in the *Winters* case.

B. The Resolution as Applied

If there be reluctance on the part of some members of this Court to deal with the question of the constitutionality of the resolution on its face, it is respectfully submitted that in the case at bar the application of the resolution

to petitioner and his organization presents an entirely different problem. Here we are concerned with an organization devoted to the advancement of civil liberties, having no other program or objective. The Committee was thoroughly familiar with its literature. It was not trying to ascertain the character of the propaganda issued by the organization by the subpoena which is here before the Court, but only to find out who its supporters were with the evident intent and purpose of giving them unfavorable publicity.

Thus, in the case at bar, the inquiry itself necessarily acted as an abridgment of freedom of speech, of the press and of assembly in violation of the First Amendment. This applies clearly from the evidence actually before the Court. It would have been conclusively established had petitioner been permitted to prove what his counsel offered to establish (see Point VI, supra).

Here we have no refusal to testify at all, as in the *Josephson* case, no facts such as the Court of Appeals found justified the subpoena in the *Barsky* case. Nor are we concerned either with the problem to which the majority of the Court of Appeals gave most of its attention in the *Barsky* case, namely, whether a witness could be asked if he was a communist.*

Whatever, therefore, might be the constitutionality of the Resolution appointing the Committee in the abstract, the question of its constitutionality as applied in this case is altogether different. Since it is evident that the purpose and effect of the inquiry is to invade rights guaranteed by the First Amendment the inquiry itself is unconstitutional.

As Judge Edgerton pointed out the situation is similar to that which was involved in the license fee cases which affected the Witnesses of Jehovah. The parallel he suggested is even stronger in the case at bar than it was in the *Barsky* case. This Court in *Murdock* v. *Pennsylvania*,

* Of course petitioner believes those cases to have been wrongly decided.

319 U. S. 105, held that municipal ordinances were unconstitutional as applied. There the ordinances were valid on their face since they were not discriminatory, nor were they applied in a discriminatory manner. Moreover, the fee charged was a moderate one. Nevertheless they were struck down when applied to the distribution of religious pamphlets sold on the public streets. This result was reached because of the impact of the fee on the circulation of religious (or for that matter political) ideas. If such an application of a valid ordinance runs foul of the First Amendment surely the application of the Resolution to the facts of this case also does.

Here we start with a legislative fiat denouncing the Federation (Ex. 17)—itself probably an unconstitutional bill of attainder (*United States* v. *Lovett*, 328 U. S. 303). This is then followed by an attempt to discover its supporters with the obvious purpose of smearing them publicly. There would be no doubt that a law which required specified organizations labelled in the law as subversive to publish a list of their supporters would be void under the *Lovett* case. When, as here, the organization is solely concerned with the protection of civil rights and its activities are fully protected by the First Amendment any similar attempt to burden its activities would be a violation of that Amendment under the *Murdock* case.

The same principles must be applicable to the investigating activities as to the legislative activities of the Congress. Otherwise form would be exalted above substance and the vital protection of the Constitution could be evaded. It is true that the Courts may be reluctant to interfere with Congressional investigations merely because impairment of freedom might conceivably result. But when such consequence is obvious and the inquiry can have no other purpose or effect than to abridge a freedom guaranteed by the Constitution the duty of a Court is plain. It must support the Constitution and block the inquiry.

The question presented certainly calls for review by this Court.

POINT II

With respect to the pertinency of the material called for by the subpoena.

The rule is quite clear that in criminal prosecutions for refusal to obey a subpoena the Trial Court must determine whether or not the question asked or the material called for was pertinent to the inquiry. The rule is fully stated in *Sinclair* v. *United States,* 279 U. S. 263. This Court said that, because of the presumption of innocence,

> "It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation" (pp. 296-297).

And:

> "The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry' " (p. 299).
>
> Cf. *McGrain* v. *Daugherty,* 273 U. S. 135, 176.

There was, therefore, a duty on the part of the Trial Court in the case at bar, evidently recognized by it, to determine this issue. It is petitioner's contention that the issue was not properly determined, or even properly understood.

Moreover a subpoena calling for the production of private papers violates the guarantee against unreasonable searches and seizures contained in the Fourth Amendment unless the material called for is relevant to some lawful inquiry. In *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, Mr. Justice Rutledge pointed out that the Amendment's requirement with regard to probable cause was satisfied by a judicial ruling that "the documents sought are relevant to the inquiry" (id. 209). Subpoenas will be held void in the absence of such relevance. See *Shotkin* v. *Nelson,* 146 F. 2d 402; *McGarry* v. *SEC,* 147 F. 2d 389.

A case particularly in point here is *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298. In that case a subpoena calling for books and records for the period of a single year was held a violation of the Fourth Amendment because it was in effect a fishing expedition into private papers. Mr. Justice Holmes said at pages 305, 306:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire."

Justice Holmes particularly called attention to the fact that the subpoena called for matters which related wholly to intrastate business. While he recognized that some part of these papers might be so connected with interstate matters as to be relevant, he said: "that possibility does not warrant demand for the whole" (p. 307). He held further that even if the proceeding had rested on substantial evidence under oath "the rudimentary principles of justice that we have laid down would apply" (p. 307).

So in the case at bar, even if there was a conceivable basis for the production of some of the records of the Federation as coming within the scope of the Resolution, in the absence of proof that all of the material called for was relevant the subpoena would be in violation of the Fourth Amendment. We, of course, contend that none of the material called for was pertinent and will now address ourselves to that problem.

1. Petitioner has consistently maintained that, in a case such as this, the issue of pertinency could not be determined without a consideration of all the facts which related to the propaganda distributed by his organization. For it must be borne in mind that he has not been charged with refusal to answer questions about the character of that organization or the activities it conducts, nor with

refusal to produce the material it had distributed. He is charged with having failed to produce the organization's financial records which were requested so as to disclose the names of contributors (see subpoena, R. 144). He stated among the reasons for his refusal to produce these records his fear that the persons whose names might be disclosed by such production would be placed on a "blacklist" by the Committee (R. 205). We submit that no inquiry into private matters such as these should be permitted except upon a clear showing of pertinency.

How can such a showing be made? The Government at the trial appears to have taken the position partly that the "reasonable belief" of the Committee was enough (R. 66) and partly that the Court could consider only what the Government said the Committee had relied on, namely, the speech of Congressman Dies (R. 102, 103). Mr. Murray said:

> "The information contained in that speech, and the contents of it, has been shown to have been in the possession of the committee, and considered by it before the issuance of the subpoena in this case.
>
> We are relying entirely upon that and therefore any evidence except that which goes to show that the Committee did not have that information before it, I submit is not relevant" (R. 103).

The Trial Court accepted this view in part and allowed in evidence some, but not all, the material which had been before the Committee (see infra 2 and Point V). But it rejected proffered material on the ground that it had not been shown that it was before the Committee, and said:

> ". . . the Committee had to function on what it had before it, and determine whether it was relevant and proper to subpoena the books and records of that party" (R. 105).

We submit that this misstates the issue. Of course the Committee could function only on what was before it, but the Committee is not here on trial. Petitioner is on

trial on a charge of having *wilfully* refused to produce certain records. He could not determine whether the records he was asked to produce were relevant on the basis of the information before the Committee since he was never informed of what that basis was. Certainly he was in no position to know what "reasonable belief" the Committee may have had. In any event he must be entitled to consider the question of relevancy on the basis of what he, as a reasonable man, knew the facts to be. Of course he ran the risk that the Court might determine the facts to be other than what he thought they were. In such a case he might be convicted. But surely he must have an opportunity of persuading the Court that he was right and that the Committee had been misguided. Certainly he cannot be held down to the information before the Committee. To do that would make it impossible for any person ever to know whether or not he was violating the law. Due process does not permit a person to be sent to jail for misjudging the impact of undisclosed information or for relying on his knowledge as against incorrect information even publicly supplied to an investigating committee. A conviction resting on such a basis would run foul of the constitutional requirement of certainty.

See:

Lanzetta v. *New Jersey,* 306 U. S. 451;
Musser v. *Utah,* 333 U. S. 95;
Winters v. *New York,* 333 U. S. 507.

This requirement, as the *Winters* case makes clear, is particularly applicable where, as here, rights under the First Amendment are involved.

Care must be taken not to confuse the justification which the Committee might have believed it had for the issuance of a subpoena with the criminal liability of the person served for disregarding it. While the facts showing a reasonable belief on the Committee's part may create a prima facie case of relevancy (and here, we submit, even

that was not established) a person charged with wilful refusal to produce records must have the right to show that in fact there was no basis for their being subpoenaed. Otherwise his rights under the Fourth Amendment have been infringed.

Indeed, if the Committee's views of pertinency are the criterion then the indictment must be dismissed. For the Committee may have reached its conclusion under either of the two parts of the Resolution and the Court of Appeals in the *Barsky* case, 167 Fed. 2d 241, indicated that the first part, the one dealing with "un-American" propaganda, violates the constitutional requirement of certainty. Since, therefore, the Committee may have acted on a ground not available to it, the refusal to obey the subpoena cannot be punished. In logic and justice the same rule should apply here as is applied to a jury verdict possibly resting on a basis held improperly before the jury. See *Nash* v. *United States,* 229 U. S. 373; *Stromberg* v. *California,* 283 U. S. 359; *Williams* v. *North Carolina,* 317 U. S. 287; *Cramer* v. *United States,* 325 U. S. 1; *Terminiello* v. *Chicago,* 337 U. S. . The rule is well stated in *Haupt* v. *United States,* 330 U. S. 631, 641, n. 1.

The argument that the actual facts must determine the issue can be sharpened by reference to a few possibilities. Suppose at a public hearing testimony is given that one John Jones was involved in a certain transaction clearly within the scope of an investigating committee and a subpoena is issued to him to produce his cancelled checks and bank accounts. Could not the individual served with the subpoena establish that he was not the John Jones connected with the particular transaction? Could he not even justify a refusal to produce his records, although admitting that he was the individual intended to be reached, by showing that the testimony that he was connected with that transaction was wholly false? Would any Court say that he must produce his private records for examination by the Committee merely because it had before it some evidence connecting this individual with the transaction

when the Court, on inquiry into all the facts, would find that there was no such connection at all?

So here, we submit, the refusal to produce the records was not a crime if in fact the propaganda activities of the organization involved were not such as brought them within the scope of the resolution governing the activities of the Committee.

The Court of Appeals recognized that the material must be pertinent but misstated the issue raised by petitioner. He has never claimed that he "must be allowed to determine the question of pertinency on the basis of what he knew the facts concerning the Federation to be". He does claim that the Court must determine what the facts are. To that contention the Court of Appeals said only that it "confuses the simple question of the relevancy of the information demanded with the broader question whether the Federation was in fact subject at all to the investigating powers of the Committee".

Then, the Court of Appeals decides the "broader" issue (never raised by petitioner) and finds that the Committee had a right to investigate the Federation. But the Court never decided the real issue in the case, namely, whether the information demanded was pertinent. This failure is all the more remarkable because in *Morford* v. *United States* (argued on the same day as this case was, and decided a week before) the same judges, this time by Judge Miller, said:

> "Obviously the first step in an investigation authorized by House Resolution No. 5 is to determine whether the propaganda being diffused is in fact subversive in the sense of the term used in the Resolution."

And in that case the Court asserted that the propaganda distributed by the organization there involved (The National Council of American-Soviet Friendship) was "of the nature described in the Resolution" because some of it, at least, involved an attack on the "principle" of our form of government. No similar statement was made, or could have been made, in the case at bar.

Such inconsistency among the same judges surely calls for review by this Court.

2. Aside from this, however, the Court did not even permit petitioner to prove what material the Committee had before it. It is perfectly obvious that the Court was not confined to a consideration of the Dies speech alone. No statement by Government counsel or the Committee itself could establish pertinence by reference only to part of what was before the Committee. Petitioner at least had the right to show that on the basis of *all* the material before the Committee the inquiry was not relevant. And the Court, in the statement we have already quoted, appeared to recognize this. Indeed it allowed defense counsel to show, in cross-examination of Mr. Adamson, that the Committee had before it a considerable number of the organization's publications (see R. 72-82). But the Court did not allow counsel to bring before the Court *all* the material which the Committee had. Only that portion of it was introduced in evidence which counsel happened to have in court and which Mr. Adamson was able to identify. For the purpose of getting it all before the Court a subpoena had been issued to the Clerk of the House of Representatives specifying in detail what material was requested (R. 26-31). Items 7 and 8 (R. 27) and 27 and 28 (R. 29) were intended to cover all the documentary material in the possession of the Committee relating to appellant's organization. Yet the Court ruled that those documents were irrelevant (R. 125, 126). That ruling cannot be justified under any theory of the case.

3. No attempt was made by the Court of Appeals to pass on the basic question whether the material called for by the subpoena was relevant to the inquiry. Instead of deciding this question the Court below merely held that it was proper for the Committee to investigate the Federation. Such a ruling would have been appropriate had petitioner refused to answer questions about the character of the organization. This, however, is not what he is being prosecuted for. All

such questions were freely answered. The Committee was fully informed of the character of the material which the Federation distributed.

In ruling that the material called for by the subpoena was pertinent to the inquiry because the Committee had the right to make some investigation of the Federation, the Court below jumped an essential step. We do not dispute that the Committee (assuming its constitutional power, for the sake of argument) would have the right to inquire into the source of contributions made to an organization where there was reasonable cause to believe that the organization was engaged in the diffusion of the kind of propaganda characterized by the Resolution. We insist, however, that unless such reasonable cause can be established, any inquiry into the contributions would be an inquiry into private matters not within the power of the Committee. Such distinction is essential to the protection of all organizations and individuals contributing toward them. Otherwise there would be practically no limits to the investigating power of a committee of Congress. It would be sufficient for someone to cast aspersions upon an organization, however unfounded such aspersions might be, in order to unleash the full light of unfavorable publicity upon all aspects of the organization and subject its contributors to embarrassment and harassment.

It is our belief that the orderly process of investigation requires no such result. While a Committee may have the right to initiate its investigatory process on the basis of rumor or even suspicion, it must be established that the organization is functioning within the ambit of the Committee's authorized activities before the Committee can pry into the private affairs of that organization and its contributors.

Reliance on the Dies speech was here insufficient. Indeed that speech should have been given no consideration whatever by the Committee. The privacy of the citizen would be illusory if it could be invaded whenever a legislator, under the cloak of immunity, made charges in a political

speech, one motivated, moreover, as here, by purely personal considerations. We do not suggest, of course, that a Committee might not examine the propaganda referred to in such a speech. But its reliance should then have been on that propaganda material, not, as here, only on the partisan speech (see R. 102).

The question here involved is of the greatest importance and should be passed upon by this Court: whether a Committee can require disclosure of contributors to an organization engaged solely in the diffusion of propaganda protected by the Bill of Rights and not engaged in the diffusion of any propaganda covered by the terms of the Resolution. That question has never been determined by this Court.

4. To sum up, to avoid conflict with the Fourth Amendment, the Government must establish pertinency. That pertinency cannot exist unless the matters inquired into relate to the subject of the inquiry. Here the subject of the inquiry is propaganda of a certain kind—not all propaganda. There is no suggestion on the part of anyone that the propaganda distributed by the Federation was of the character described in the Resolution. Inquiry into the source of the funds responsible for the propaganda is therefore without pertinence.

POINT III

The validity of the subpoena under the Fourth Amendment.

Petitioner attacked the validity of the subpoena both by motion to dismiss in advance of trial (R. 3), and by motion for acquittal at its conclusion (R. 128) and by motion for a new trial (R. 36).

The subpoena (Ex. 1, R. 144) called upon appellant to produce "all books, records and correspondence pertaining to the National Federation for Constitutional Liberties relating to the solicitation and disbursement of funds with a list of all contributors". It will be observed that there

was no limitation as to time and, in effect, none as to substance. Actually, to comply with this subpoena petitioner would have had to produce all the financial records and all correspondence relating to contributions and to all expenses for the entire period of the organization's existence. This was nearly six years. (The Federation was organized in June, 1940—R. 52; the subpoena was dated January, 1946—R. 144.)

It is settled law that a subpoena that is too broad is void as a violation of the guaranty against unreasonable searches and seizures contained in the Fourth Amendment: *Hale* v. *Henkel,* 201 U. S. 43; *Bank of America National Trust & Savings Assoc.* v. *Douglas,* 105 F. (2d) 100 (App. D. C.).

It is also settled that the validity of such a subpoena can be tested by refusing to obey it, since there can be no appellate review of an order denying a motion to vacate. *Cobbledick* v. *United States,* 309 U. S. 323. While this principle has ordinarily been enunciated in prosecutions for contempt of court, the rule must be the same in prosecutions under Title 2, § 192, which is the equivalent of a contempt prosecution.

There is no merit to the suggestion made by Judge Holtzoff in his opinion denying the motion to dismiss (R. 23) that petitioner might not be able to raise the point because the subpoena called for records of an organization, citing *United States* v. *White,* 322 U. S. 694. That case dealt with the privilege against self-incrimination which is not available to a corporation, or by analogy, to a voluntary association. Here we are relying on the Fourth Amendment which applies equally to corporations and individuals. (See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.) Indeed in the *Hale* case, supra, the subpoena called for the production of corporate records.

There can be no doubt that the same rules apply to subpoenas issued by legislative committees as to subpoenas issued by any other governmental authority. *United States* v. *Groves,* 18 F. Supp. 3.

We come, therefore, to the question whether the subpoena does violate the Fourth Amendment. Subpoenas less extensive than this have been condemned. See *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298; *Ex parte Brown*, 72 Mo. 83; *People* v. *Reynolds*, 350 Ill. 11; *In re United Shoe Machinery Corporation*, 6 F. R. D. 347.

The cases cited by Judge Holtzoff (R. 23) as indicating that the subpoena was valid are not in point. In *Brown* v. *United States*, 276 U. S. 134, the subpoena covered only a three-year period and was limited as to subject matter; in *Wheeler* v. *United States*, 226 U. S. 478, the period was less than one and a half years. The subpoena in the case at bar is much more like the one condemned in the *Hale* case.

POINT IV

The rulings on the *voir dire*.

During the examination of the talesmen it, of course, became evident that a number of them were government employees. In this particular case it seemed to defense counsel that such employees should not serve at all, or at least, not until they had been questioned about the impact of their employment upon the conscientious exercise of their duties as jurors.

The Court was first asked to exclude all government employees because the Committee was in effect the complaining witness (R. 39) and also because the pendency of the loyalty investigations might affect the judgment of the jurors (R. 40). The Court denied the motion (R. 40). Defense counsel also asked that those talesmen who were government employees be asked whether, in the light of the circumstances, they had any fear (Q. G. 18, R. 39, see discussion, R. 41). The Court refused to permit the question to be asked unless it were emasculated by leaving out the explanatory introduction (R. 41). Two government employees served on the jury (R. 42, 43).

We recognize, of course, that in the ordinary criminal prosecution a person is not disqualified from jury service merely because he is an employee of the Government which is prosecuting the case. *United States* v. *Wood,* 299 U. S. 123. But this Court recognized that the rule was not of universal application. Here, we submit, is a situation to which a different rule should be applied.

For this prosecution was started at the request of the House Committee on Un-American Activities. The past proceedings of that Committee indicate the extent to which it has pilloried and blacklisted persons who had some connection with activities it disliked. (See offers of proof, Deft.'s Ex. 25 for Id. and 26 for Id., R. 149-152, 158-164, Ex. 17, pp. 235-238 and testimony concerning Clifford M'Avoy and Michael Quill at pp. 122-124.) Moreover, the loyalty investigation of all government employees recently ordered by President Truman (Ex. Order 9835, 12 Fed. Reg. 1935), and still under way, was inspired by the same Committee. That Executive Order specifically mentioned the files of the Committee as source material for the investigations. Under these circumstances there is a real possibility that government employees might find it difficult conscientiously to serve as jurors in a case such as this, for fear that participation in a disagreement or an acquittal might result in black marks against them in the records of the Committee and in an investigation of their loyalty.* No talesman should have been asked to suffer this sword of Damocles, no accused should have his liberty depend on the absence of such a fear in his particular case. Surely there would have been enough talesmen available though all government workers had been excluded.

Moreover, in the *Wood* case this Court stressed the fact that a defendant should have the fullest opportunity for probing actual prejudice. Chief Justice Hughes said:

> "It is said that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting,

* See Andrews, Washington Witch Hunt.

to employees of the treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances" (299 U. S. at 149, 150).

Here such full inquiry was not permitted since the crucial question (Q. G. 18, R. 39) was not allowed.

The case at bar thus presents an issue very similar to that on which this Court granted certiorari on June 27, 1949, in *Dennis* v. *United States.*

POINT V

The holding that certain documentary material offered by the defense was irrelevant.

Defense counsel issued subpoenas to obtain certain documents from the possession of the Committee (R. 26-31) and the Attorney General (R. 31-36). The Court ruled that these documents were irrelevant (R. 104, 126). These rulings were included in the grounds of the motion for a new trial (R. 36, 37).

We have already indicated the basis on which this material should have been received. It was all relevant on the issue of the pertinency of the material called for in the subpoena directed to petitioner. So much of it as had been before the Committee when it directed the issuance of that subpoena was relevant under the Trial Court's own ruling (R. 105). The Court permitted the introduction into evidence of such material as happened to be in the possession of defense counsel and to be identified by Mr. Adamson. There was no conceivable basis for rejecting other material which had also been before the Committee. Without *all* that material the Court could not possibly determine the issue of pertinency.

POINT VI

The rejection of proffers of proof made by the defense.

In support of its argument that the Committee was exceeding its constitutional powers and was invading the protected areas of freedom of speech and of the press, defense counsel sought to establish that the Committee was guided by no standards (R. 105-107), that its activities were not in fact within the framework of the Resolution (R. 108-113), that the Committee characterized as un-American and subversive persons who had attacked it (R. 114, 115), including the Federation (R. 236), that its principal activity was to maintain a "black list" (R. 115-117), that this list was compiled without any procedural due process afforded the Federation or the other individuals and organizations named (Ex. 25 for Id., R. 235, 236), that the Committee was primarily engaged in non-legislative activities for the purpose of obtaining conformity to its views (Ex. 26 for Id., R. 237, 238). The Court held all these offers irrelevant (R. 97, 120, 126) and specifically refused to receive the two detailed offers above referred to (Exs. 25, 26 for Id., R. 97, 127).

This material, if received by the Court, would have destroyed the Government's contention that the records sought by the subpoena were pertinent to the inquiry the Committee had been authorized to conduct.

We submit that this material was relevant also to a proper understanding of the basic constitutional contentions and should have been received. This Court has often had occasion to comment on the undesirability of passing on grave constitutional issues without a full factual background. *Bunting* v. *Oregon*, 243 U. S. 426, 438; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548; *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194, 213.

It is necessary to show the actual functioning of a challenged law in order to rebut the presumption of constitutionality which otherwise attaches. See *Snowden* v. *Hughes*, 321 U. S. 1, 8-9.

POINT VII

The rulings with regard to wilfulness.

In order to persuade the jury that he had not wilfully refused to produce the subpoenaed records petitioner asked to have read to the jury the statements (Exs. 14, 16) which he had given to the Committee when he appeared before it. This request was refused (R. 127).

Petitioner requested the following charges on the subject of wilfulness (R. 129):

> "(11) Wilfulness is a state of mind. You must consider the state of mind of the Defendant at the time the alleged offense occurred, and you must determine whether the Defendant was wilful or not at such time.
>
> "(12) The absence of wilfulness may be deduced from the Defendant's conduct, from the things he did or said, and from all other circumstances which surrounded his alleged failure to produce the records called for by the Summons or subpoena.
>
> "(13) In the commission of an offense under the law under which the Defendant is charged in this case, wilfulness denotes an act done with an evil purpose, without justifiable excuse, and without ground for believing it lawful, or conduct marked by careless disregard of whether or not one has a right to act.
>
> "(14) If you believe that the Defendant refused to produce the papers or records as charged in the indictment because he had an honest, bona fide belief that the Committee on Un-American Activities was acting beyond its power and in an unconstitutional manner, you may consider this fact in determining whether or not Defendant's conduct in such refusal was wilful."

The Court did not expressly rule on any of these requests, indicating that exceptions should be taken after the charge to the extent that they were not granted (R. 133).

The Court's actual charge on this subject was very

brief and reads as follows—the matter in parentheses being supplied to correct an evident error in the printing:

> "Several times during this charge I have used the term 'wilful' or 'wilfully.' 'Wilful' as used in 2 United States Code, Section 192, the section under which the defendant is indicted, means 'deliberate and intentional' and (not by) inadvertence or accidental. Thus, the motive of the defendant in failing to comply with the subpoena and his reason for such failure are not material, so long as you find that the defendant did so intentionally and deliberately" (R. 140).

Counsel excepted to the refusal to charge as requested and specifically to the charge as made (R. 141).

We recognize, of course, that this Court has refused to review the holding in *Fields* v. *United States,* 164 F. (2d) 97, cert. den. 332 U. S. 851, that "wilful" in this statute means only "deliberate". But we submit that a different rule is applicable here because the Resolution could be saved from condemnation on the score of vagueness only by interpreting "wilful" to mean more than "deliberate", as was done in *Screws* v. *United States,* 325 U. S. 91.

CONCLUSION

We respectfully submit that there are important questions which call for review by this Court so that the scope of the powers of congressional committees and the rights of persons and organizations called on to produce private records may be determined and clarified.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Petitioner.

APPENDIX A

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 197

GEORGE MARSHALL, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 239-242) has not yet been reported. The opinion of the District Court denying motions to dismiss the indictment and for a bill of particulars (R. 13-24) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1949 (R. 242). The petition for

a writ of certiorari was filed July 16, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the resolution creating the House Committee on Un-American Activities and defining the scope of its investigatory powers is constitutional.

2. Whether the trial court correctly held that the documents called for by the subpoena served upon petitioner were pertinent to a legitimate inquiry being made by the Committee.

3. Whether the subpoena was so broad in its sweep as to violate the Fourth Amendment.

4. Whether government employees should have been excluded from the jury because of alleged prejudice in favor of the Government.

5. Whether a deliberate refusal to produce subpoenaed records is wilful even though the party subpœnæd honestly believes the Committee has no power to compel production of the records.

STATUTES AND RULE INVOLVED

R. S. §102, as amended (2 U.S.C. 192), provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee estab-

lished by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

R. S. §104, as amended (2 U.S.C. 194), provides:

Whenever a witness summoned as mentioned in section 102 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall

be to bring the matter before the grand jury for its action.

Rule XI of the Rules of the House of Representatives, 79th Congress, as amended and adopted on January 3, 1945, by H. Res. No. 5, 79th Cong., 1st sess. (91 Cong. Rec. 10, 14-15), provided in pertinent part as follows:[1]

* * * * *

> The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

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[1] The quoted portion of Rule XI was, subsequent to the date of the offense charged against petitioner (April 11, 1946), renumbered as paragraph (1)(q)(2) of Rule XI by Section 121(b) of the Legislative Reorganization Act of August 2, 1946, c. 753, 60 Stat. 823, 828-829.

For the purpose of any such investigation, the Committee on Un-American Activities, or any sub-committee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * *

STATEMENT

Petitioner, chairman of the National Federation for Constitutional Liberties (hereinafter called the Federation), was served with a subpœna *duces tecum* to produce before the Un-American Activities Committee of the House of Representatives (hereinafter called the Committee) "all books, records, documents and correspondence pertaining to the National Federation for Constitutional Liberties relating to the solicitation and disbursement of funds with a list of all contributors" (R. 144). Petitioner appeared before the Committee in Washington, D. C., on April 11, 1946 (R. 43-44), but refused to produce these documents (R. 7, 8). An indictment (R. 2-3), filed March 21, 1947, in the District Court

for the District of Columbia, charged him with wilfully making default by reason of such refusal, in violation of R.S. §102, as amended (*supra*, pp. 2-3). Petitioner's motion to dismiss the indictment and alternative motion for bill of particulars were denied (R. 13-24), and following a trial by jury he was found guilty (R. 143), and was sentenced to three months' imprisonment and a $500 fine (R. 37-38). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was affirmed (R. 242).

ARGUMENT

1. Petitioner's first contention that the House resolution creating the Committee on Un-American Activities and defining the scope of its investigatory powers is unconstitutional as violative of the First and Fifth Amendments (Pet. 19-21) is without merit. *Josephson* v. *United States*, 165 F. 2d 82, 87-92 (C.A. 2), certiorari denied, 333 U.S. 838; *Barsky* v. *United States*, 167 F. 2d 241, 244-251 (C.A. D. C.), certiorari denied, 334 U.S. 843, petition for rehearing pending; *Eisler* v. *United States*, 170 F. 2d 273, 279 (C.A. D. C.), certiorari granted, 335 U.S. 857, cause ordered removed from docket, June 27, 1949; *Dennis* v. *United States*, 171 F. 2d 986, 987-988 (C.A. D. C.), certiorari granted, limited to a different question, June 27, 1949. We respectfully refer the Court to our brief in the *Eisler* case, *supra*, No. 255, Oct. Term, 1948, pp. 22-64 (see also our brief

in opposition to certiorari in the *Josephson* case, *supra,* No. 535, Oct. Term, 1947, pp. 11-18) for our answers to petitioner's constitutional arguments.

2. Petitioner then urges that the Government failed to establish that the documents called for in the subpœna *duces tecum* were pertinent to the "matter under inquiry" by the Committee, as required by R. S. §102, as amended (*supra,* pp. 2-3), and that the Court of Appeals made no ruling on the question of pertinency (Pet. 22-30). We submit that both contentions are without substance.

a. The trial court decided the issue of pertinency as a matter of law—as was proper (*Sinclair* v. *United States,* 279 U.S. 263, 298)—in favor of the Government. The decision was clearly correct. Before the Committee issued the subpœna, it had before it a speech by Congressman Dies, Chairman of the Special Committee on Un-American Activities of the House of Representatives, 77th Congress (predecessor of the Committee involved in this case), delivered on the floor of the House on September 24, 1942 (R. 47, 48; 88 Cong. Rec. 7441-7458). In the course of this speech, Congressman Dies read a confidential report of the Attorney General (R. 52-54; 88 Cong. Rec. 7446-7447), which indicated that the Federation was a "Communist-front" organization. Congressman Dies' speech also stressed a close alliance between Federation leaders and other

Communist groups.[2] Under these circumstances, the Committee had sound reason to believe that documents relating to the solicitation of funds and a list of the contributors to the Federation were pertinent to its inquiry into subversive organizations and their activities. For, if there was ground to believe that 53 of the officers and sponsors of the Federation (out of a total of 78 (88 Cong. Rec. 7449)) were also important leaders of American Peace Mobilization, "the most completely Communist organization that was ever formed in the United States,"[3] it was certainly pertinent to the Committee's inquiry to ascertain, through its subpœna powers, whether some of the Federation's funds were collected from Communists engaged in "subversive * * * propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution." *Supra,* p. 4. And it was equally pertinent to

---

[2] E.g., "* * * 53 of the officers and sponsors of the National Federation were also leaders of the American Peace Mobilization, the most completely Communist organization that was ever formed in the United States. This is the same organization that picketed the White House for 1,500 hours. It is the same organization that provided services and advice for those who wanted to evade the draft law of the country. It is the same organization that instigated strikes in the defense industries of our land" (R. 59; 88 Cong. Rec. 7449).

[3] The strict Communist line followed by American Peace Mobilization is exemplified by its sudden reversal from opposing the draft to a policy of strong aid to the Allies after the German invasion of Russia. 88 Cong. Rec. 7444.

ascertain whether the Federation's funds were used for the support of such propaganda.

The Committee clearly was not limited to investigating the printed pamphlets and literature publicly distributed by the Federation. The Resolution's language is not limited to *printed* propaganda openly circulated. As pointed out by the Court of Appeals (R. 241), "the modern pattern of subversive propaganda, as exemplified by that of the Communist Party, may be composed of two aspects. There is first a public aspect, which by itself may appear quite innocent, and indeed may seem commendable in the objects and causes which it appears to espouse. But this public feature of the subversive propaganda technique is often only a means of hiding, strengthening, and enlarging the sphere of operations of a subversive organization. The real purpose and goal which seeks to destroy our constitutional guarantees, may never be openly and publicly announced * * * ." The secret dissemination of subversive propaganda plainly requires the full investigatory attention of the Committee. While the sources of the Federation's funds are not subversive propaganda *per se,* it is evident that information in respect thereof may be helpful in indicating whether the Federation was actually engaged in making un-American and subversive propaganda, and also the "extent, character, and objects" and the "diffusion" of any such propaganda carried on by the Federation. The Com-

mittee thus had power to require the production of Federation records for an account of its funds; and identification of the contributors was equally within the legitimate scope of its authority. *Barsky* v. *United States, supra,* 167 F. 2d at 244, 246; *United States* v. *Seymour,* 50 F. 2d 930, 939 (D. Nebr.). The Committee's power of inquiry, anticipating all possible cases, was very broad, and the evidence in the subpœnæd records came within the scope of the inquiry. *Townsend* v. *United States,* 95 F. 2d 352, 361 (C.A. D. C.), certiorari denied, 303 U.S. 664.

Petitioner argues that because the Committee may have reached its conclusion of pertinency under the first sub-clause of the Resolution dealing with "un-American" propaganda (*supra,* p. 4), indicated in the *Barsky* case as violating the constitutional requirement of certainty, the refusal to obey the subpoena cannot be punished (Pet. 26). But the *Barsky* opinion (167 F. 2d at 247) stated merely that "perhaps" sub-clause (1), taken alone, would be too vague to be valid, but made no holding to that effect. In our view, sub-clause (1) is not to be read alone, but in connection with the entire Resolution, and in its context is sufficiently definite. See Brief for the United States in the *Eisler* case, *supra,* pp. 58-60. Also, in the Dies speech and in the Attorney General's reports contained therein, the Committee had before it such a wealth of information purporting to link the

Federation with other Communist organizations that the presumption is most reasonable that the Committee considered as applicable sub-clause (2), held definite enough in the *Barsky* case (167 F. 2d at 247).

Nor can petitioner properly demand, as he does (Pet. 25), that the District Court determine for itself, on all the evidence made available at the trial by the parties, whether the Federation could reasonably be said to have been engaging in propaganda within the Committee's jurisdiction. The issue in the present proceeding is solely whether the *Committee* had reasonable grounds to believe, on the information available to it at the time of the issuance of the subpœna, that the Federation's activities fell within its competence. If the Committee had such reasonable belief, obedience to its subpœna was imperative, even though a full and complete investigation might have exonerated the association from any taint of engaging in subversive and un-American propaganda activities. Cf. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 208-209, 214-217. Petitioner misses this fundamental point when he states that "care must be taken not to confuse the justification which the Committee might have believed it had for the issuance of a subpoena with the criminal liability of the person served for disregarding it" (Pet. 25-6). On this theory, the Committee could be right in issuing the subpœna and the person

served also be right in disobeying it. This argument, besides being contradictory in itself, ignores the obvious purpose of the criminal statute, R. S. § 102, as amended (*supra*, pp. 2-3), to give force to subpœnas of a Congressional Committee and to compel obedience to subpœnas rightfully issued.

b. Petitioner also complains because, as he says, the Court of Appeals did not decide whether the documents called for in the subpœna were pertinent, but only held that it was proper for the Committee to investigate the Federation (Pet. 27, 28). While the Court of Appeals does not state in so many words that the documents subpœnæd were pertinent, the court so held by necessary implication. The court's statement that the third clause of the Resolution clearly includes "an inquiry as to finances and personnel" (R. 240) is equivalent to a holding of pertinence. The court recognized that the question presented was whether in an investigation of the Federation it was pertinent for the Committee to inquire as to the finances and personnel of the organization (R. 241). The words of an opinion "are to be read in the light of the facts of the case under discussion." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133. Since the Court of Appeals, in the light of the facts of the case, recognized the question of pertinency, and expressly decided that the Federation was subject to the investigatory powers of the Committee, it is plain that the decision neces-

sarily held that the documents subpœnæd were pertinent to the inquiry.[4]

3. Petitioner urges that the subpoena was so broad that it violated the Fourth Amendment (Pet. 30-32). This argument was rightly rejected by the District Court (Holtzoff, D. J.) in its opinion overruling the motion to dismiss the indictment, on the authority of *Brown* v. *United States*, 276 U.S. 134, 138, and *Wheeler* v. *United States*, 226 U.S. 478, 483 (R. 23). The scope of subpœnas in the *Brown*[5] and *Wheeler*[6] cases was much

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[4] A court's opinion may, of course, constitute a certain holding without expressly so stating. *In re Cliquot's Champagne*, 3 Wall. 114, 143-144; *Steel & Tubes* v. *Clayton Mark & Co.*, 21 F. Supp. 326, 334 (D. Del.); *Gallagher* v. *Clark*, 5 F. Supp. 547, 548 (S.D. Iowa); *People ex rel. Hallock* v. *Hennessy*, 206 N.Y. 750, 751, 100 N.E. 407, 408.

[5] The subpoena called for all letters or copies of letters, telegrams or copies of telegrams, incoming or outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, their officers, and agents, and the several members of said Alliance and its predecessor from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods with reference to general meetings, zone meetings, costs, grading, price lists, discounts, prices, curtailment of production, cost bulletins and other items. 276 U.S. at 138-139.

[6] The subpoena called for all cash books, ledgers, journals, and other books of account of Wheeler & Shaw, Inc. for and covering the period between October 1, 1909, and January 1, 1911, all copies of letters and telegrams of Wheeler & Shaw, Inc., signed or purported to be signed by said Wheeler & Shaw, Inc., or by its president or its treasurer during October, November, and December 1909 and the entire year of 1910. 226 U.S. at 483.

broader than the subpœna in the case at bar. In those cases the subpœna covered all kinds of correspondence and records pertaining to the business of the companies involved, whereas here the subpœna was confined narrowly to documents relating to "solicitation and disbursement of funds with a list of all contributors" (R. 144). Though the periods of time[7] covered by the subpœnas in the *Brown* and *Wheeler* cases were somewhat less than that embraced by the instant subpœna,[8] the scope of those subpœnas was far broader in respect of the types of documents called for. In *Hale* v. *Henkel,* 201 U.S. 43, relied upon by petitioner (Pet. 31), the subpœna (201 U.S. at 45) was held so sweeping in its terms as to be unreasonable and to have the effect of completely putting a stop to the business of the company (201 U.S. at 77). Obviously, the subpœna here involved was subject to no such criticism.

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[7] That the period of time covered is not alone determinative of the validity of a subpoena is shown by *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 210, where the subpoena held valid called for "all of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, *1938,* and the date hereof." The record in that case shows that the subpena was dated October 14, *1943.* No. 61, Oct. Term, 1945, R. 11. The period covered was five years. See also *United States* v. *Medical Society,* 26 F. Supp. 55, 57 (D. D. C.) upholding a broad subpoena from January 1, 1932, to October 15, 1938.

[8] The Federation was organized June 7, 1940 (R. 52) and the subpoena was dated January 23, 1946 (R. 144).

4. Petitioner contends that no government employees should have been allowed to serve on the jury, since, in order to retain their jobs and preserve their government records from "black marks," they would have been afraid to acquit petitioner because of the pendency of the President's loyalty investigation of government employees (Pet. 32-34).

There were only two government employees on the jury, a post office employee and an employee of the District of Columbia Government (R. 42, 43). Petitioner exercised two of his three peremptory challenges on non-government employees, who had brothers in the police department (Tr. 98-99, 119-120). The issues which were submitted to the jury were simply whether the Chairman of the Un-American Activities Committee issued and signed a subpœna, whether it was served on petitioner, and whether he, having custody of the records called for, intentionally refused to produce them (R. 138-140). The only reference in the case to subversive activities was at the hearing on the issue of pertinency, which was conducted outside the presence of the jury (Tr. 205). Hence, a verdict of acquittal by the jury could not reasonably be construed as a repudiation of any action or policy of the Attorney General or any other government officer in administering the loyalty program. Under these circumstances, an order excluding all government employees from the jury panel would, we believe,

have been inconsistent with the rule of *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, since government employees constitute a substantial cross-section of the community. And it is settled that, as a general rule, the presence of government employees on the jury in a criminal prosecution does not *ipso facto* deprive the defendant of an impartial trial. *Frazier* v. *United States,* 335 U.S. 497; *United States* v. *Wood,* 299 U.S. 123.

Petitioner's only contention (Pet. 34) to the effect that he was deprived of an opportunity to make "full inquiry" into the possibility of "actual bias" on the part of prospective jurors is based on the fact that he was forbidden to ask them the following question (R. 39; cf. R. 41):

> Pursuant to the Executive Order providing for a loyalty check of Government employees, the records and files of the House Committee on Un-American Activities are to be used in the investigation of Government employees. In view of that fact and the fact that the House Committee on Un-American Activities initiated the proceedings which resulted in this trial, have you any fear that if you were required on the evidence in this case to acquit the defendant, that your action in so doing might prejudice you in any way in your Government employment.

We think the exclusion of this question, as it was phrased, was proper. The preamble necessarily

suggested, contrary to the facts, that a vote for acquittal might well be used to harm the career of a juror in government employ. Consequently, the question, if permitted, would have tended to raise groundless fears that the Committee might hold such jurors suspect of sympathy for Communism and enter notations of such suspicions in its files, which later might prejudice them in loyalty investigations. There was a real possibility, therefore, that the asking of such a question would have the very effect which it was the purpose of the *voir dire* to insure against—a jury that was not wholly impartial.

However, on June 27, 1949, the Court granted certiorari in *Dennis* v. *United States,* 171 F. 2d 986 (C. A. D. C.), No. 14, this Term, on the "question whether government employees could properly serve on the jury which tried" Dennis for a similar violation of R. S. § 102 in failing to respond to a subpœna issued by the Committee. Since the broad question to be discussed in the *Dennis* case is whether government employees are disqualified as a class from jury service in cases of this type, and that issue is also presented here, it is suggested that on this point the Court enter an appropriate order in this case in the light of the final decision to be reached in the *Dennis* case.

5. Petitioner maintains that his refusal to produce the subpœnæd records was not wilful under R. S. §102 (*supra,* pp. 2-3) if he did not act with

an evil purpose but with a bona fide belief that the Committee was acting beyond its power (Pet. 36-37). This argument has been raised in numerous cases under this statute, but has been uniformly rejected. *Fields* v. *United States,* 164 F. 2d 97, 100 (C.A. D. C.), certiorari denied, 332 U.S. 851; *Barsky* v. *United States supra,* 167 F. 2d at 251; *Eisler* v. *United States, supra,* 170 F. 2d at 280; *Townsend* v. *United States,* (C.A. D. C.), 95 F. 2d 352, 357, certiorari denied, 303 U.S. 664. The case of *Screws* v. *United States,* 325 U.S. 91 (Pet. 37), involved a statute entirely different from the one here involved and is not an authority for changing the established rule.

6. Other points pressed less strenuously by petitioner are that the court erred in excluding certain documents in possession of the Committee and the Attorney General (Pet. 34), and in rejecting offers of proof as to activities of the Committee relative to other matters not involved in the case at bar (Pet. 35).

In regard to the documents in the possession of the Committee (R. 26-31) and the Attorney General (R. 31-36), containing all possible information about the Federation, these files were confidential[9] and not admissible in behalf of petitioner.

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[9] Attorney General Order No. 3229, May 2, 1939, in effect at the time of the trial and at present reads: "All official files, documents, records and information in the offices of the Department of Justice, including * * * Federal Bureau of Investigation * * * are to be regarded as confidential * * *. Whenever a subpoena duces tecum is served to produce any

The disclosure of this highly confidential information to the public generally would greatly weaken the power of the Committee and the Attorney General to investigate subversive activities and deter members of the public from reporting such activities for fear that their names might be disclosed. There was no duty on the part of the Government to produce its files for the benefit of petitioner. *Goldman* v. *United States,* 316 U.S. 129, 132; *Jordan* v. *Bondy,* 114 F. 2d 599, 602-603 (C.A. D. C.): *United States* v. *Muraskin,* 99 F. 2d 815, 816 (C.A. 2). Moreover, the requested material had no substantial bearing on the issue of the reasonableness of the Committee's belief that the Federation was carrying on propaganda activities subject to investigation. *Supra,* pp. 7-12.

As to the rejection of offers of proof of other activities of the Committee not involved here (Pet. 35), that question has been decided contrary to petitioner's contention in *Barsky* v. *United States, supra,* 167 F. 2d at 251; see also *Eisler* v. *United States, supra,* 170 F. 2d at 279, holding that evidence that the Committee acted for ulte-

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of such files, documents, records or information, the officers or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation." See refusal of Attorney General's representative to produce documents (R. 101-102). See also *United States* v. *Schine Chain Theaters, Inc.,* 4 F.R.D. 108 (W. D. N.Y.); *United States* v. *Bayarsky,* 51 F. Supp. 974, 975 (D. N.J.).

rior motives not within the scope of its powers or the powers of Congress was properly rejected because the court had no authority to scrutinize the motives of Congress or one of its committees.

CONCLUSION

Subject to the qualification stated at p. 17, *supra,* with regard to the service of government employees on the jury which tried petitioner, we respectfully submit that the petition for a writ of certiorari presents no question requiring further review by this Court and should therefore be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 197.

GEORGE MARSHALL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 236.

RICHARD MORFORD, *Petitioner,*

v.

UNITED STATES OF AMERICA.

BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD.

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BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD.

STATEMENT.

The National Lawyers Guild, a bar association with a nationwide membership, is pledged by its charter "to protect and foster our democratic institutions and the civil rights and liberties of all the people." It is vitally interested in legal principles which have important impacts on civil liberties. The legal principles in the cases at bar, as

in the other cases flowing out of hearings of the House Committee on Un-American Activities, directly involve "the civil rights and liberties of all the people." Unless there is reversal of the principles established by the lower courts in these cases, our civil liberties are truly endangered. The National Lawyers Guild has, accordingly, secured the consents to the filing of this brief of the attorneys for the parties herein.

Constitutional issues similar to those involved in the instant cases have been the subject of petitions for writs of certiorari previously presented to this Court. In connection with those petitions, the National Lawyers Guild has filed briefs amicus curiae; these briefs have set forth the basis for the Guild's concern with the issues which the pending petitions again present. It is a concern which increases, as the number of cases growing out of hearings of the House Committee on Un-American Activities increases, and as the restrictive effects of the actions of this Committee on the civil liberties of the people becomes increasingly apparent. Because of this growing concern, we are impelled to submit this brief amicus curiae.

ARGUMENT.

I.

The Resolution Creating the House Committee on Un-American Activities is Unconstitutional, Being an Abridgement of the Rights Guaranteed by the First Amendent.

We are aware of the traditional reluctance of the Courts to interfere with the functioning of the legislative branch of the government. However, the Courts have recognized that it is their duty to intervene, where circumstances require, to prevent Congress from depriving citizens of their basic rights, not only when the deprivation arises from Congressional use of its legislative power, but also when it is the result of Congressional use of the investigatory

power. *Kilbourn* v. *Thompson*, 103 U. S. 168, 181; *McGrain* v. *Dougherty*, 273 U. S. 135, 176; *Jurvey* v. *McCrackin*, 294 U. S. 125. We respectfully submit that the instant cases present circumstances which clearly call for the intervention of the Courts.

The First Amendment is an absolute prohibition against Congressional interference with the right of freedom of speech, press and assembly. It contains no escape clause, It does not say Congress shall not abridge freedom of speech, except "subversive" speech, or "un-American" speech, whatever these adjectives may mean. Nor does the First Amendment permit round-about, devious means of defeating its purpose. The argument that Congress by investigation may abridge freedom of speech, although it cannot by law, an argument which has been used to sustain the validity of the House Resolution, smacks of such deviousness. The power to investigate is no more than a means, an instrumentality for securing effective legislation. It is an implied right, only incidental and auxiliary to the right of Congress to legislate (*Barry* v. *United States, ex rel. Cunningham*, 279 U. S. 597, 613; *Marshall* v. *Gordon*, 243 U. S. 521, 541; *Sinclair* v. *United States*, 297 U. S. 263, 291). To say that this incidental right gives Congress greater power than it derives from the Constitution is indeed to achieve an illogical and topsy-turvy result.

In considering that the First Amendment makes no specific reference to Congressional investigations, it must be borne in mind that when the First Amendment was adopted, Congress had not yet asserted its claim of power to conduct investigations in aid of legislation. (*Kilbourn* v. *Thompson, supra.*) It must also be borne in mind that originally the substance of the First Amendment was not inserted into the Constitution because of the assumption of its framers, expressed by Alexander Hamilton, that freedom of speech, press and assembly was absolute, subject to no restraints, no restrictions, and needing no specific Constitutional protection.

We must conclude that the First Amendment prohibition against public inquiry into matters falling within its realm, (*United States* v. *Ballard*, 322 U. S. 78; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624), is a limitation on Congressional investigatory power, as well as on its legislative power (cf. *Colonial Sugar Refining Co.* v. *Attorney General*, 15 Commonwealth L. R. (1914) App. Cas. 237; *Greenfield* v. *Russell*, 292 Ill. 392, 127 N. E. 105). We are bolstered in this conclusion by the decisions of this Court, giving a preferred place to the protections afforded by the First Amendment.

That the Congressional investigatory power can be a means of restraining free speech has been amply proved by the Resolution here being considered, and by the history of its administration by the House Committee on Un-American Activities. The very fact that the subject matter for investigation under this Resolution is a type of "propaganda activities" makes its validity suspect, for that which normally falls within the ambit of propaganda activities is the very thing entitled to the protection of the First Amendment. The Court of the Appeals for the District of Columbia, in the process of upholding the constitutionality of the Resolution, has indicated that it is a restraint upon freedom of speech. *Barsky* v. *United States*, 167 F. 2nd 241. The limitations upon freedom of speech resulting from the investigations conducted by the House Committee on Un-American Activities pursuant to the Resolution have been shown in many briefs presented to this Court, by the National Lawyers Guild, as well as by others, and we shall not repeat the facts therein contained. (Cf. Brief submitted in support of petition for certiorari in *Barsky et al.* v. *U. S.*, October Term, 1947, No. 766, and *Josephson* v. *U. S.*, October Term, 1947, No. 535).

Where the abridgement of the rights guaranteed by the First Amendment is clear, as here, the Supreme Court has the duty to consider whether there is any constitutional

warrant for that abridgement. We submit that no warrant exists.

II.

The Resolution Violates the Fifth and Sixth Amendments.

The Resolution authorizes an investigation into "un-American propaganda activities", and "subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution. . . ."

To meet the constitutional requirements of due process a criminal statute must have definiteness and certainty. *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Winters* v. *New York*, 333 U.S. 507; *Kraus & Bros.* v. *United States*, 327 U.S. 614. While the indictments in the instant cases were brought under Section 192, Title 2 of the United States Code, Section 192 has no meaning unless the Resolution is by reference made a part of it. Therefore, the Resolution must conform to the same standards of definiteness as must a penal statute. *Kraus & Bros.* v. *United States, supra.*

An examination of the Resolution reveals that the key phrase, repeated both in subclause (i) and subclause (ii), is "un-American propaganda activities." This key phrase, used by itself in subclause (i), has no ascertainable meaning. Cf. *Barsky* v. *United States, supra.* The phrase "subversive and un-American propaganda" used in subclause (ii) must fail of definitness because of its inclusion of the phrase "un-American propaganda"; it does not gain precision by the inclusion of "subversive" but becomes more meaningless, since the latter word has no definable content. Cf. *Winters* v. *New York*, 333 U.S. 507.

Nor is definiteness supplied by the addition of the phrase "the principle of the form of government as guaranteed by our Constitution," in subclause (ii). What is *the* principle to which reference is made? Is there only one? If more than one, which one is meant? A person faced with threat of criminal sanctions should not be required to play guessing games, yet this Resolution compels such guesswork.

The Court of Appeals for the District of Columbia, considering this Resolution, attempted to supply meaning to it by saying that the use of the phrase last quoted lent content to the words "subversive and un-American". But in the very course of this discussion, it found itself referring to *"the principles"* underlying the form of the existing government, *"the principles"* of the Constitution, *Barsky* v. *United States,* 167 F. 2d 241, a tacit admission of the impossibility of talking in terms of a single principle as *"the principle"*. Cf. *Schneiderman* v. *United States,* 320 U.S. 18.

Under this Resolution, because of its vagueness, the Committee administering it has felt free to inquire into anything it chose, anything which at the moment incurred its displeasure. For these excursions, with their incalculable harm to civil liberties, the Resolution must bear fault equally with its administrators.

The Resolution, which carries with it the threat of criminal sanctions, since it becomes part of 2 U.S.C. 192, is both in its entirety and in each of its subclauses so vague and indefinite that it fails to meet the due process requirements of the Fifth and Sixth Amendments to the Constitution.

CONCLUSION.

Great issues are at stake. The right to speak freely, the right to be free from Congressional investigation into opinions of private citizens, the right to hold opinions without expressing them publicly, are among those involved in these cases. Their importance cannot be gainsaid. The legal questions arising in these cases have not yet been authoritatively answered. The freedom from jail of many people, and the freedom to speak of many millions, depend on these answers. For the benefit not only of the petitioners, but for the benefit of all of our citizens, this Court should hear

and determine the vital issues herein being presented to it. We urge that the petition be grantd.

Respectfully submitted,

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No. 766

EDWARD K. BARSKY, *et al., Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF

Statement

The Civil Rights Congress (hereinafter called the Congress) respectfully moves for leave to file a brief amicus curiae in support of the petitions for certiorari herein and in support of the petition for rehearing in the *Barsky Case*. Consent to such filing has been given by counsel for petitioners in all the cases and by counsel for the Government.

The Civil Rights Congress, as its name indicates, is an organization devoted to the protection, extension, and strengthening of civil rights in this country. It has chapters in all parts of the United States, including all of the principal cities. The constitution of the Congress provides that in order to achieve its major objective, the Congress will engage in efforts along the following lines:

> "To strive constantly to safeguard and extend all democratic rights, especially the rights of labor, and of racial, political, religious and national minorities;
>
> "To combat all forms of discrimination against these groups;
>
> "To defend and aid victims of the fight for these groups;
>
> "To fight against domestic fascism and all of its forms—jim crow, anti-Semitism, red-baiting, discrimination against the foreign born.
>
> "To these ends the Civil Rights Congress dedicates itself—
>
> "To educate, mobilize, and help coordinate the efforts of the democratic forces of America in the defense and advancement of their civil rights and democratic rights;
>
> "To promote the unity of all groups and individuals dedicated to the defeat of fascism in all its forms."

The petitions in these cases raise fundamental constitutional and other issues concerning the creation and functioning of the Un-American Activities Committee of the House of Representatives (hereinafter called the Commit-

tee). Because the Congress regards the Committee as a profound and pervasive menace to the civil liberties of the American people, the Congress believes that the filing of this brief is not only consistent with its purposes but is also a responsibility it owes to the continuance of the American democratic tradition.

No governmental agency in the history of our country has done as much to undermine our basic liberties as has the Un-American Activities Committee and its predecessors. For more than a decade, this Committee has roamed at large in areas which the Constitution forbids to any agency of government. The Committee has trampled on free speech and utterance. The Committee has interfered on a large scale with freedom of assembly and freedom of association. The Committee has employed as a guiding principle the doctrine of "guilt by association" which this Court has condemned as violative of our traditions (*Schneiderman* v. *U. S.*, 320 U. S. 118, 136). The Committee has inhibited freedom of thought and has drastically choked off the free discussion of political issues which the Constitution seeks to encourage and which is more than ever necessary in a period when fateful issues confront the American people. The Committee has interfered in political elections and in the legitimate activities of labor organizations. The Committee has attacked and denounced common citizens, public officials, Cabinet members, and the President of the United States merely because their notions of sound public policy differed from the Committee's.

The Committee, though an arm of the legislature, does not concern itself really with legislation. Instead, the Committee acts as if it has been given a mandate to pass judgment on political, social, and economic ideas, and to indict and convict as "disloyal" or "subversive" or "un-American" any person whose ideas or affiliations it disapproves. The Committee has sought to punish, in one way or another, those it has found "guilty". The Committee has slandered and libeled and held up to public contempt and obloquy countless persons and organizations which have refused to accept its standards of orthodoxy.

In all these activities, the Committee has never felt itself bound by accepted rules of procedure or by standards of fair play which are the essence of due process, and has issued reports and statements on a wholesale scale without giving its victims the opportunity to be heard or the opportunity to test, by cross-examination or otherwise, the accuracy or truthfulness of its informants and witnesses.

The people of the United States are today faced with the most extensive and violent onslaught ever made on their civil liberties. Encouraged by the apparent success of a committee of the Congress in this field, several states have set up committees which have employed methods similar to those employed by their federal progenitor, with similar results and effects. The preoccupation with "loyalty" which the Committee has stimulated has generated widespread efforts by the Federal Government, by state and local governments, and by other private and public constitutions, to separate the "loyal" from the "disloyal", and to impose "loyalty" oaths and affidavits. The result has been an unprecedented interference with freedom of speech, thought, assembly, and association.

The Federal Government's loyalty program, and the Attorney-General's list of proscribed organizations which is part of that program, has given the full sanction of the Executive Department to the Committee's notion that government has the power to tell the people to what organizations they may or may not belong, what thoughts they may or may not think, what words they may or may not utter, what meetings they may or may not attend.

This blantant trampling by government on the most fundamental of constitutional and human rights has had fearful results. The encouragement given to truly undemocratic forces by these policies has already eventuated in widespread interference with freedom of assembly and in vicious and violent physical attacks on peaceful meetings of citizens. The private and public educational institutions and systems in the country are in constant agitation as authorities seek to impose "loyalty" tests and

other implements of orthodoxy while teachers struggle to resist them, so that while it is generally agreed that the deterioration of the country's educational plant has reached emergency proportions and that a common effort must be made to solve common problems, our educational institutions are rent by violent dissension and educational leaders become more and more alarmed.* The channels of political discussion have been so poisoned that debate turns less and less on issues and more and more on imputations of disloyalty, so that no man, no matter how brilliant his record of public service, is free of such imputations as long as he dares advocate social, political, or economic reform.

It is for these reasons and for many others which limitations of space prevent us from detailing, but which are set forth in the petitions and briefs in the five cases, that we say that the Committee is a profound and pervasive menace to the liberties of the people. It is for these reasons that we believe that this Court has no more solemn responsibility than that of passing on the merits of the serious issues presented by the petitions in these cases.

This Court has said that:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein" (*Board of Education* v. *Barnette,* 319 U. S. 624, 642).

The Court has vindicated this principle in many other cases as well as in the *Barnette Case.* It is difficult for us to imagine any cases which more clearly call for its further vindication than these five cases. The Un-American

---

* "The Educational Policies Committee, whose membership includes Gen. Dwight D. Eisenhower, president of Columbia University, and James B. Conant, head of Harvard University, declared last night that state laws requiring special loyalty oaths of teachers were a menace to educational freedom" ("Educators Warn on Loyalty Oaths", N. Y. Times, Oct. 9, 1949, p. 1).

Activities Committee of the House of Representatives *does* prescribe what shall be orthodox in politics, nationalism, and other matters of opinion. The Un-American Activities Committee of the House of Representatives *does* force citizens to confess by word or act their faith therein. We respectfully urge the Court to assert once more that the Constitution is supreme over such tyranny.

Argument

Although each of the five petitions presents different issues which concern the Civil Rights Congress, the constitutional issue under the First and Fifth Amendments is common to all the cases and this brief therefore will deal with that issue. In addition, the issue concerning the nature of the evidence required by the Committee in its subpoenas and in its questions to witnesses raises a basic issue of civil rights, and involves the First, Fourth, and Fifth Amendments and Article I, Section 10 of the Constitution.

I

The Resolution creating the Committee is unconstitutional on its face and as applied.

The Resolution creating the Committee authorizes it to investigate "un-American propaganda activities" and "subversive and un-American propaganda" that "attacks the principle of the form of government as guaranteed by our Constitution" (Legislative Reorganization Act of 1946, Sec. 121(b), 60 Stat. 828).

No one would dispute the proposition that a regulatory or penal statute would be unconstitutional on its face if it embodied the words and phrases contained in the Resolution (*Stromberg* v. *California,* 283 U. S. 359; *Herndon* v. *Lowry,* 301 U. S. 242; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Thornhill* v. *Alabama,* 310 U. S. 88; *Winters* v. *New*

York, 333 U. S. 507). In fact, as we understand the argument of the Government and the reasoning of the Court of Appeals in the five cases, it is conceded that such a regulatory or penal statute would be unconstitutional as an interference with the rights guaranteed under the First Amendment and as being too vague and indefinite under the due process clause of the Fifth Amendment. But, says the Court of Appeals, since these cases concern not a regulatory or penal statute, not the power of Congress to legislate but the power of Congress to investigate to determine whether it should legislate, the First and Fifth Amendments are not applicable. Typical of this attitude of the Court of Appeals is the statement in its opinion in the *Barsky Case*, 167 F. (2d) 241, that the precedents we have cited and similar cases "dealt with statutes which actually imposed a restriction upon speech or publication" (246). But, argues the Court, here is not such a statute but a resolution which authorizes investigation into "threats to the existing form of government by extra-constitutional processes of change" (id.).

It is submitted that the Court of Appeals is guilty of a shocking misconception of the great constitutional guarantees and that unless that misconception is corrected such a gap will have been torn in the First Amendment as to make it only a question of time until our liberties run out entirely. The Amendment says that "Congress shall make no law * * * abridging the freedom of speech * * *." The Court of Appeals says that this means that Congress "shall make no penal or regulatory law * * * abridging the freedom of speech * * *" and that therefore Congress may pass a "resolution" which does not regulate or penalize but which permits investigation even if free speech is abridged.

The cases in this Court permit no such construction of the First Amendment. To the contrary, this Court has found again and again that the First Amendment forbids impairment of the right to speak no matter in what manner or in the exercise of what granted or reserved power

the impairment is attempted (*Meyer* v. *Nebraska,* 262 U. S. 390; *Stromberg* v. *California,* 283 U. S. 359; *Lovell* v. *Griffin,* 303 U. S. 444; *Bridges* v. *California,* 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *United States* v. *Ballard,* 322 U. S. 78; *Thomas* v. *Collins,* 323 U. S. 516; *Hannegan* v. *Esquire,* 327 U. S. 146; *Knauer* v. *United States,* 328 U. S. 654).

The cited cases involve highly diverse Federal and State powers and varying forms of direct and indirect interference. Uniformly this Court in absolute terms has vindicated the untrammelled right to speak.* All of the expressions of the Court are consistent with the ringing affirmation in the *Barnette Case* that the First Amendment does not permit Government to separate the orthodox idea from the unorthodox, to distinguish "good" ideas from "bad", to forbid some utterances and permit others, to approve propaganda which is not "subversive" and disapprove propaganda which is. In *Hannegan* v. *Esquire,* the Court said that it would be "a radical departure from our traditions" if Congress "undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country" (327 U. S. 146, 156). In the *Stromberg Case,* the Court said that: "The maintenance of the opportunity for free political discussion * * * is a fundamental principle of our constitutional system" (283 U. S. 359, 369). In the *Knauer Case,* the Court said that any effort to punish opinions "runs counter to our traditions" (328 U. S. 654, 658). Any interference or burden on "the dissemination of ideas" is unconstitutional, said the Court in the *Thornhill Case* (310 U. S. 88, 97). This fundamental tenet has had this exposition from Mr. Justice Jackson, concurring in *Thomas* v. *Collins:*

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false

* It is apparently conceded that neither the Resolution nor the Committee's actions thereunder can be justified under the "clear and present danger" test (*Schenck* v. *United States,* 249 U. S. 47). Any such justification would be palpably ridiculous.

doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us" (323 U. S. 516, 545).

The assumption in the opinions of the Court of Appeals that although it may be true that the First Amendment limits all other legislative powers, it does not limit the power to investigate, is a false assumption. As we have shown, the First Amendment allows *no* exception. The power to investigate is a power incidental to the power to legislate. If legislation may not abridge fundamental rights, then neither may investigation. Investigation must bear some reasonable relation to prospective legislation, and if Congress may not legislate on a subject it may not investigate it (*Kilbourn* v. *Thompson,* 103 U. S. 168).* As we have said, it cannot be argued and it is not argued, that Congress has the power to legislate that "subversive and un-American propaganda", for example, may be punished or regulated. By the same token, Congress has no power to investigate "subversive and un-American propaganda."

Since, as we have said, it has been conceded that a penal or regulatory statute embodying the standards of the Resolution would be unconstitutional, it is scarcely necessary to argue the point except to note that standards considerably more definite and unambiguous than these

* The Committee has in a sense confessed its powerlessness to recommend legislation in this field. After a decade of sensational headliness announcing the imminent crumbling of the pillars of the Republic, the Committee has not given birth to a single piece of valid legislation (94 Cong. Rec. 2495 (1948); Note, 96 U. of Pen. Law Review, 381, 396 (1948)). In fact, the only statute which has emanated from the endeavors of the Committee, at least indirectly, was found to violate the provision against bills of attainder (*United States* v. *Lovett,* 328 U. S. 303).

have been found to violate the First and Fifth Amendments (*Herndon* v. *Lowry,* supra, and *Lanzetta* v. *New Jersey,* supra). However, since we argue that even if the Resolution could conceivably be sustained on its face, it has been unconstitutionally applied, we pause at the outset of that part of the argument to point out how vague, uncertain, and ambiguous the standards are. It will then be clear that such standards could not possibly be applied in a constitutional manner.

There is of course no authoritative definition of "un-American" or "subversive" or of "the principle of the form of government as guaranteed by the Constitution." It is generally recognized by rational Americans, no matter what their own beliefs are otherwise, that the term "un-American" or "subversive" is a term of opprobrium which means only that the speaker does not approve the person or subject to whom the term is applied. As the Court put it in *Feinglass* v. *Reinecke,* 48 F. Supp. 438: "Any political idea that happens to conflict with the economic or political notions of an individual is apt by him to be deemed un-American" (at 441).

Nor is there any more authoritative exposition of "the principle of the form of government as guaranteed by the Constitution." There is of course no *one* principle embodied in the Constitution but it is our own conviction that if it were necessary to select one principle which most nearly expresses the essence of our constitutional democracy it would be the "fixed star" which this Court defined in the *Barnette Case:*

> "* * * no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein" (319 U. S. 624, 642).

It is this principle which we are asking the Court to vindicate in these cases.

Once we go beyond this principle, this "fixed star", there is no principle on which there is easy agreement. Jus-

tice Edgerton, dissenting, pointed this out in the *Barsky Case* (167 F. (2d) 241, 262). This Court has also said so in the *Schneiderman Case,* 320 U. S. 118, in *Girouard* v. *United States,* 328 U. S. 61, and in other cases.

The history of the Committee demonstrates its inability to define these so-called standards. Time and again, members of the House have asked for definitions but have received none (81 Cong. Rec. 3286 (1937); 89 Cong. Rec. 806 (1943)). The chief counsel of the Committee advised a member of the House that the Committee has adopted no definitions (92 Cong. Rec. A4743 (1946)).

In this context, it is small wonder that the Committee has taken "as its field the whole gamut of American political, social and economic life" in an "almost unlimited variety" of investigations (Note, 47 Columbia Law Review at 418). The Committee has attacked the President of the United States, the Vice-President, and Cabinet members. It has compiled a blacklist of the names of one million "subversive" persons and over 1,000 "subversive" organizations (H. R. Rep. No. 2748, 77th Cong., 2nd Sess., 2, 3 (1943); H. R. Rep. No. 2742, 79th Cong., 2nd Sess., 16 (1947); 89 Cong. Rec. 797 (1943)). It has attacked or investigated or reported on opposition to "the American system of checks and balances", opposition to the Franco government, opposition to General MacArthur, advocacy of a world state, and criticism of members of Congress and of the Committee itself (Note, 47 Columbia Law Review at 422, 423). In fact, a complete analysis of the work of the Committee, its hearings, its reports, its statements, the speeches of its members, would show that it has attempted to label as "subversive" or "un-American" practically every single important political, social or economic idea which is current in America but which the Committee or its members disapprove.

The petitions in these very cases demonstrate the scope of the Committee's activities:

(1) George Marshall (No. 197) is before this Court because he was chairman of the National Federation

for Constitutional Liberties, which distributed literature in support of the right to vote, in support of equal rights to work and to use of public facilities, in defense of Negroes against maltreatment, in defense of the rights of labor, in defense of democracy in education and in the Armed Forces, and material pointing out the danger of native fascism in America (Marshall's Petition, p. 3). The Committee regards this propaganda as "subversive" or "un-American."

(2) Richard Morford (No. 236) is before this Court because he is Executive Director of the National Council of American-Soviet Friendship, Inc., which was organized in 1943, when the United States and the Soviet Union were allied in war, for the following purpose: "To promote better understanding and strengthen friendly relations between the United States and the Soviet Union as essential to the winning of the war, and the establishment of world-wide democracy and enduring peace" (Morford's Petition, p. 2). Its activities and propaganda were all directed to the achievement of this purpose, and have been supported by a large number of notable Americans (id., pp. 2-3). The Committee believes that such propaganda is "subversive" or "un-American."

(3) John Howard Lawson (No. 248) and Dalton Trumbo (No. 249) are before this Court because they are motion picture writers and because the Committee undertook an investigation of the motion picture industry for the purpose of eliminating the type of pictures which the Committee disapproved and encouraging production of the type of pictures which the Committee would approve (Lawson's Brief, p. 61 ff.). The Committee believes that some motion pictures are "subversive" or "un-American", and others are not.

(4) Edward Barsky (No. 766) and others are before this Court because they are chairman and mem-

bers, respectively, of the Executive Board of the Joint Anti-Fascist Refugee Committee, a relief organization licensed by the President's War Relief Board (Barsky's Petition, p. 2). The Committee believes that it is "subversive" or "un-American" to furnish relief to the victims of Franco's fascist repression.

Thus, the five petitions present to the Court as representative a picture of the Committee's notions and activities as it is possible to get from so small a sampling. In these cases, the Committee has acted on the explicit assumption that it is "subversive" or "un-American" to engage in the protection of civil rights and labor's rights and in a struggle to eliminate discrimination against the Negro people; or to attempt to foster friendship and understanding between this country and the Soviet Union; or to make motion pictures on any other terms than the Committee's notions of good and bad; or to furnish food and shelter to the victims of fascist terror and repression. In carrying out these notions, the Committee has here used its customary variety of weapons. It has required the production of financial and other records of the organizations involved; it has required the open confession of political beliefs and affiliations; it has used sensation-seeking publicity, the threat, the blacklist, the awful stigma of disloyalty.

These cases demonstrate that the Committee has applied the Resolution in a manner which violates the constitutional guarantees in shocking fashion, that it has set itself up as the supreme arbiter of what Americans shall and shall not think. No person, no matter how conservative he may believe himself to be, is safe from an inquisition such as this. And since there is no way of telling in advance what the Committee may or may not approve, there is an extensive previous restraint on the freedom to speak, the freedom to assemble, the freedom to associate.

We do not believe that this Court will give its approval to such tyranny.

II

The Committee's use of the blacklist is unconstitutional.

As we have indicated, these cases also illustrate the extent to which the Committee has used the blacklist, a weapon which our entire history has led us to regard as unfair, sinister, and undemocratic. In *Marshall's Case,* the subpoena required the production of the records of the National Federation for Constitutional Liberties relating to the solicitation and disbursement of funds with a list of all contributors. In *Morford's Case,* the subpoena required the production of all books and records showing all the receipts and disbursements by the National Council of American-Soviet Friendship, Inc., and all correspondence and communications for the year 1945. In the *Lawson* and *Trumbo Cases,* the questions required disclosure of political beliefs and affiliations, and the Committee otherwise made it plain that an object of its investigation of the motion picture industry was to establish a blacklist of writers, directors, producers, and actors (Lawson's Petition, p. 69 ff.). In the *Barsky Case,* the subpoenas required the production of all books and records concerning receipts and disbursements; correspondence and communications; and lists of contributors for the years 1944 and 1945.

The requirements here sought to be imposed by the Committee in its subpoenas and in its questions to witnesses violate the Fourth and Fifth Amendments to the Constitution. Since these constitutional issues are fully argued in the briefs supporting the petition, we will not burden the Court with further argument, but we do wish to set forth our views on the pernicious and sinister nature of a government blacklist.

Although the blacklist has been used in other connections, its greatest use in this country has been against militant union members. The use of such blacklists became so wide-

spread at the end of the last century and the beginning of this, that most of the states enacted statutes making blacklisting a crime. Such statutes were held to be constitutional (see, e.g., *Johnson* v. *Oregon Stevedoring Co.,* 128 Ore. 121, 270 Pac. 772). Although the National Labor Relations Act does not specifically deal with blacklisting, this Court has sustained the application of Section 8(3) of the Act to blacklisting (*N.L.R.B.* v. *Fruehauf Trailer Company,* 301 U. S. 51. See also *Mackay Radio & Telegraph Co.,* 1 N.L.R.B. 201.)

The statutory prohibitions against blacklisting are based on the conception that a man should not be deprived of his livelihood because of the exercise by him of rights which he may exercise under the Constitution. A man has the right to join a union and to be active therein and the interference with that right may be prevented constitutionally. (*N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1.)

This Court has also recognized this conception in other situations, particularly in legislative attempts to cut off those of whom the legislature disapproves from their specific jobs (*United States* v. *Lovett,* 328 U. S. 303) or from their chosen professions. The *Lovett Case,* and *Cummings* v. *Missouri,* 4 Wall. (U. S.) 277, and *Ex parte Garland,* 4 Wall. (U. S.) 333, hold that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution" (328 U. S. 303, 315-316). In the *Lovett Case,* the Court said that proscription from employment is punishment "of a most severe type", as is the imposition of the stigma of disloyalty (at 316).

In these five cases, like in the *Lovett Case,* we have an open and avowed effort to build up a blacklist, the effect of which would be to make employment impossible for the victims. One of the members of the Committee said during the course of the hearings on the motion picture industry:

"* * * we have the problem of eliminating the Communist element from not only the Hollywood scene but also other scenes in America * * *" (quoted in *Lawson's* Brief, p. 70, n. 3). This is merely one illustration of the Committee's openly stated official objective of driving out of employment, public and private, all persons whom it finds to be "subversive". (9 Hearings before Special Committee to Investigate un-American Activities on H.R. 282, p. 5447 (1939).) And, as we have noted, the Committee has prepared a carefully indexed blacklist of a million "subversive" persons and over 1,000 organizations. In these five cases, the information required by the Committee, particularly in the subpoenas calling for lists of contributors, could serve only to swell this sinister blacklist.

The creation, maintenance, and application of such a blacklist violates not only the Fourth and Fifth Amendments and Article I, Section 10 of the Constitution relating to bills of attainder, but also violates the First Amendment. What more serious interference with the right of free speech can be imagined than the threat that if the right is exercised the speaker faces the loss of employment and denunciation as "subversive". Is this not the same "punishment—of a most severe type" which this Court denounced in the *Lovett Case*? The same conclusion is of course applicable here to the exercise of the other great rights—freedom of press, assembly, and association. Those who write in support of ideas or policies of which the Committee disapproves, those who attend meetings of organizations on the Committee's blacklist, those who join or contribute to such organizations, all such persons are in danger of such retaliation. And the danger is the more sinister and pervasive, the more obviously unconstitutional in that while the idea may not yet have been disapproved by the Committee, it may disapprove the idea tomorrow, while the organization is not yet on the blacklist, the Committee may put it on tomorrow.

Finally, the application of the concept of guilt by association which is at the core of the blacklist weapon as em-

ployed here, in the same way as it permeates the Committee's work as a whole, is particularly abhorrent to our constitutional traditions. The Committee's adoption of this doctrine impairs the exercise by every American of his freedom of association, without which participation in the political life of the country is meaningless and which in turn destroys the First Amendment rights—freedom of speech, press, and assembly.

In the face of this Court's explicit rejection of the doctrine of "guilt by association" (*De Jonge* v. *Oregon,* 299 U. S. 353; *Schneiderman* v. *U. S.,* 320 U. S. 357), the Committee has erected the doctrine into a cardinal principle. The use of the doctrine by the Committee in its blacklist and in all of its other activities leads to far-reaching previous restraints on liberty. Hardy indeed is the American who still dares exercise his right to associate freely. With his job, his future, his reputation, and his self-respect at stake, with the danger to having attached to him the stigma of "disloyalty", with the likelihood that the Committee may unloose upon him its favorite technique of "exposure" (with its accompaniment of klieg lights, television cameras, sensational headlines, and slanted reports), he must think twice and three times before he attends a meeting in protest against discrimination against Negroes or before he contributes a dollar or two to feed a refugee from Franco Spain.

Such an unprecedented application of the doctrine of "guilt by association" has recently been severely condemned by a prominent member of the New York Bar, with a long record of distinguished public service (John Lord O'Brian, "Loyalty Tests and Guilt by Association", 61 Har. L. Rev. 592). His condemnation of the doctrine finds full support in the language and decisions of the Supreme Court:

> "Guilt with us remains individual and personal * * * " (*Kottlakos* v. *U. S.,* 328 U. S. 750, 772).
>
> "Under our traditions beliefs are personal and not a matter of mere association * * * " (*Schneiderman* v. *U. S.,* 320 U. S. 118, 136).

> "The doctrine of personal guilt is one of the fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law" (Mr. Justice Murphy, concurring in *Bridges* v. *Wixon*, 326 U. S. 135, 163).

And it is worth recalling that in 1920, when as now, political fears and tensions generated repressive measures against freedom of thought and association, Mr. Charles E. Hughes, later the Chief Justice, protesting against the expulsion from the New York Assembly of five duly elected members of the Socialist Party, declared that "it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts • • • " (*Memorial of the Special Committee Appointed by the Association of the Bar of the City of New York*, 5 N. Y. Legis. Doc. No. 30, 143rd Sess. 4 (1920)).

The Committee's application of the doctrine of "guilt by association" calls for the severest condemnation by this Court. Unless this is done, the exercise of the rights guaranteed by the First Amendment will become so perilous as to endanger the future of self-government in America.

III

CONCLUSION

With all the earnestness at our command, we respectfully urge this Court to grant the petitions herein. The House Committee on Un-American Activities has already done untold injury to our freedoms. Its activities are blatantly violative of the constitutional guarantees. We urge this Court to so declare.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 197

GEORGE MARSHALL, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No. 236

RICHARD MORFORD, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No. 248

JOHN HOWARD LAWSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No. 249

DALTON TRUMBO, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No. 766

EDWARD K. BARSKY, et al., *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF

Statement

The Council on African Affairs, Inc. (hereinafter called the Council) respectfully moves for leave to file a brief amicus curiae in support of the petition for rehearing in the *Barsky Case* and in support of all the petitions for certiorari herein. Consent to the filing of this brief has been given by all counsel in the cases.

The Council is a membership corporation organized to study the conditions of life and work in Africa and to promote the welfare of the African people. Its activities include the holding of meetings, forums and discussions, the distribution of literature, memorials and studies on conditions and social status of native Africans and the solicitation of funds for the support of these projects.

Obviously the Council, as do similar organizations, relies upon its ability to reach large segments of the American people with the information it has at its disposal and seeks their aid in the accomplishment of the Council's purposes. It is therefore particularly susceptible to any abridgement of the right of any group of the American people to associate with, join or directly or indirectly support this organization. It is the contention of the Council that the Resolution creating the House Un-American Activities Committee (hereinafter called the Committee), and the activities of the Committee are unconstitutional as violating the First, Fourth, and Fifth Amendments to the Constitution.

Argument

Since the issues are fully argued in the petitions and briefs herein, the Council sees no reason for burdening the Court with argument that would be repetitious. We wish only to emphasize that the Resolution and the work of the Committee have led to the most serious attack on civil rights and on constitutional guarantees ever seen in this country.

The Resolution on its face has made this result possible. What are "un-American propaganda activities"? What is "subversive and un-American propaganda" which "attacks the principle of the form of government as guaranteed by our Constitution"? Neither this Court nor any other court, person, or agency has ever defined these phrases. The only use to which they have been put to denounce ideas with which the speaker finds himself in disagreement. The most ambiguous of all terms is "subversive" (*Emerson and Helfeld,* "Loyalty Among Government Employees", 58 Yale L. J. (1948) 12 at 39.)

A statute containing phrases as indefinite and ambiguous as these is clearly unconstitutional in violation of the First and Fifth Amendment (*Herndon* v. *Lowry,* 301 U. S. 242; *Lanzetta* v. *New Jersey,* 306 U. S. 451). And it makes no difference that the statute is not penal but merely authorizes investigation, for this Court has struck down legislation interfering with First Amendment rights no matter how the interference has been attempted (*Thomas* v. *Collins,* 323 U. S. 516; *Hannegan* v. *Esquire,* 327 U. S. 146).

As applied, the Resolution is even more clearly unconstitutional. Studies of the work of the Committee show that it has set itself up as the supreme censor of political ideas and discussion. (See, e. g., Note, 47 Columbia Law Review at 418). The five petitions involved here demonstrate the scope of the Committee's activities. Involved in the five cases are investigations by the Committee of a civil rights organization, of an organization devoted to the encouragement of friendship and understanding between the United States and the Soviet Union, of an organization engaged in the relief of refugees from Franco Spain, and an investigation into the motion picture industry. No Congressional investigation which interferes with such activities, involving as they do the exercise of the rights of free speech, press, assembly, and association can be found to be constitutional. All subpoenas directed towards the production of records relating to such activities,

all questions relating to the political affiliations of persons engaged in such activities, violate the Fourth Amendment.

The Committee in its activities has made it dangerous for any American to express himself freely or to associate freely with his fellows. The Resolution as thus applied is unconstitutional.

For these reasons, we urge that the petitions herein be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 197

GEORGE MARSHALL,

Petitioner,

against

THE UNITED STATES OF AMERICA.

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to reconsider its determination made on April 10, 1950, denying petitioner's application for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit to review the affirmance of his conviction for a violation of Section 192 of Title 2 of the United States Code.

This petition is based in part on matters which have either arisen since the filing of the original petition or were not referred to therein and, craving the indulgence of the Court, in part with regard to matters referred to in the original petition.

1. While this Court, by its decision in the *Dennis* case on March 27, 1950, settled the question of the right of government employees to sit as jurors even in cases such as this, one aspect of that problem remains open here. In the *Dennis* case Mr. Justice Minton stressed the fact that there had been full inquiry into the possible prejudice of

jurors because of the impact of the loyalty program, and in the *Morford* case, decided April 10, 1950, the Court reversed a conviction similar to the one here on the ground that the Trial Court had not allowed such inquiry. We respectfully submit that the ruling in the *Morford* case is applicable here also. For in the case at bar two government employees sat on the jury (R. 42), and one applicant for government employment, Mr. Campbell, Juror No. 4 (Tr. 96) * also sat.

The Trial Court here refused to permit the jurors to be adequately questioned on this subject. For it refused to allow the following question to be addressed to all the talesmen who were government employees:

> "G-18. Pursuant to the Executive Order providing for a loyalty check of Government employees, the records and files of the House Committee on Un-American Activities are to be used in the investigation of Government employees. In view of that fact and the fact that the House Committee on Un-American Activities initiated the proceedings which resulted in this trial, have you any fear that if you were required on the evidence in this case to acquit the defendant, that your action in so doing might prejudice you in any way in your Government employment?" (R. 39).

After this question was objected to by government counsel (R. 40) the matter was argued at some length with the result that the Court refused to allow the question to be put (R. 41).

Petitioner is annexing as an appendix hereto and as a part hereof those portions of the transcript of the trial which bear on the examination of those talesmen who were government employees. The questions which petitioner's counsel requested be put are set forth in full from the bottom of page 57 through page 60 of the transcript. Petitioner is omitting the discussion of these questions which followed, since the part which refers to the crucial question

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* These references are to the original page numbers of the voir dire minutes annexed hereto as an appendix.

above quoted, No. 18, is contained in the joint appendix (R. 39-41) and the rest is not relevant since the proceedings in the presence of the jury fully reflect what questions were actually asked.

Commencing on page 108 the Court addressed itself particularly to those members of the panel who were government employees and read to them the first sixteen of the questions originally proposed with some slight verbal modifications. It will be observed that only one of the talesmen, Mr. Carl, stated that he had ever been questioned with regard to possible subversive activities (Tr. 109), but it turned out to be a case of sabotage (Tr. 110). In any event this talesman was challenged by the defense (Tr. 117).

The Trial Court questioned the panel generally about its knowledge of the loyalty order and the check of employees being held pursuant to it. Only one of the jurors, Mr. Endres (who was also later excused—Tr. 120), admitted to any knowledge of this subject (Tr. 111, 112). It is important to note that this talesman was, at a conference at the bench (Tr. 111), asked the question whether in connection with the loyalty check he had any fear that he might be prejudiced by any decision he might make in the case (Tr. 112) and answered that he had no such fear.

This question, however, linking the loyalty order with its impact on a possible decision in the case was not put to any of the other talesmen and was, of course, not heard by them when it was put to Endres at the bench. This was the gist of Question 18 which the Trial Court refused to allow to be put. While it is true that the Trial Court did put the last part of this question (Tr. 114), that was so emasculated as to have no significance. For as put the talesmen were merely asked if they feared that any action in the case might prejudice them in their employment, without any reference whatever to the impact of the loyalty program. Moreover, the Court did not put this question in the context of the questions which did relate to the loyalty program.

Petitioner calls attention to the fact, moreover, that in his case the question of possible bias was greater than in either the *Dennis* or the *Morford* cases. For the organization of which he was head had attacked the Dies Committee and its successors (R. 209). Moreover, the only reliance by the government on the subject of relevancy here was the speech of Congressman Dies which to a large extent was devoted to charges against the Federation (R. 52 ff., 156 ff.). And the committee itself in one of its reports attacked the Federation (see Ex. 17, one of the exhibits physically handed to the Court).

Petitioner submits, therefore, that what happened at this trial is not a compliance with the requirement of investigation of possible bias and prejudice as required by the *Dennis* case and the cases there cited. It should be noted that in the *Dennis* case the questions which were put to the talesmen and quoted in Footnote 4 of the Court's opinion directly connected the possible fear of loss of job with the loyalty test. In this case, as in the *Morford* case, that was not done.

It is respectfully submitted, therefore, that at the very least the same decision should be made in this case as was made in the *Morford* case.

2. Petitioner submits also that his application should be reconsidered because this Court failed to apply to his case the rule laid down in *Christoffel* v. *United States,* 338 U. S. 84. There it was held that where a witness' conduct before a congressional committee is challenged, it is an essential part of the offense with which the witness can be charged that a quorum of the committee was actually present. The same rule has been applied to situations identical with that in which petitioner finds himself, namely, a charge of contempt for failure to produce documents under a subpoena. *Fleischman* v. *United States,* 174 F. (2d) 519, and *Bryan* v. *United States,* 174 F. (2d) 525 (both awaiting decision by this Court after grant of certiorari at the request of the government—338 U. S. 846).

The government made no attempt to show in the case at bar that there was a quorum of the House Committee on Un-American Activities present at the time of petitioner's alleged contempt. Petitioner's motion to dismiss the government's case should therefore have been granted (see R. 128).

3. Petitioner asks that his application be reconsidered, moreover, because there is now pending before this Court an application for rehearing in the case of *Barsky* and others (this Court having originally denied certiorari, 334 U. S. 843). Many of the issues in the *Barsky* case are identical with those in petitioner's case so that surely there should be no final determination of his case while the other remains undetermined in this Court.

4. Petitioner also asks the indulgence of the Court further to discuss two of the matters on which his petition originally rested.

Ever since the Dies Committee began developing guilt by association into a weapon of character assassination, persons concerned with the preservation of our free civilization have had doubts about the validity of the resolution under which that committee and its successors acted (see brief amicus of the American Civil Liberties Union submitted in *Eisler* v. *United States,* 338 U. S. 189).

For many years no judicial test of these doubts was possible because the various committees confined their inquiries to persons only too glad to appear before them. When finally witnesses were called who were prepared to test the powers of the committee and the scope of its resolution it was, naturally, supposed that ultimately the question would have to be determined by this Court. The Court's refusal to do so in the first of the cases, *Josephson* v. *United States* (333 U. S. 838, in review of 165 F. (2d) 82), followed by its refusal to do so in the next case, *Barsky* v. *United States* (334 U. S. 843, in review of 167 F. (2d) 241), was, of course, a disappointment in this

respect. Perhaps the *Josephson* case might have been an unsuitable one for a test of the issue because Josephson simply refused to testify at all. And in the exercise of the wide discretionary power which this Court possesses in these matters the Court may have felt in the *Barsky* case that the issues were not yet "ripe for adjudication". Since then the cases have multiplied and there is, of course, every prospect that they will continue to multiply. It is difficult to understand the basis for the Court's present refusal to hear and decide these grave issues.

This is particularly so because of the repeated statements by this Court that the denial of certiorari imports no determination on the merits. Mr. Justice Frankfurter went to great pains to point out the various considerations applicable to the grant of certiorari in *Maryland* v. *Baltimore Radio Shows,* 338 U. S. 912, and this subject was further explored in *Darr* v. *Burford,* decided on April 3, 1950. It is respectfully submitted that none of the considerations referred to in those cases as justifying denial of certiorari is here present and that the Court, as the final arbiter of the Constitution and particularly charged with safeguarding the Bill of Rights, should not evade its responsibilitiy definitely to set at rest the controversy which has arisen with regard to the scope of the resolution under which this committee is created, particularly because of its impact on freedom of opinion and association and because of the vagueness of its terms of reference.

That the issues are important and require determination by this Court was evidently recognized when it granted certiorari in the *Eisler* case (335 U. S. 857). The issues remain unchanged despite Eisler's escape and the consequent dismissal of that case (338 U. S. 883). As Mr. Justice Jackson said when the fact of Eisler's escape was first called to the Court's attention and it was decided merely to postpone action (338 U. S. 189):

> "Under our practice, the grant of Eisler's petition meant that four Justices of this Court, at least, were in agreement that the questions he raised were of

this description. If they were then, they are still. His petition challenged the power of Congress and its investigating committees to hold, and to control the procedures of, investigations of this nature. These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon congressional procedures as well. No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here.

"Decision at this time is not urged as a favor to Eisler. If only his interests were involved, they might well be forfeited by his flight. But it is due to Congress and to future witnesses before its committees that we hand down a final decision."

The opportunity which was lost because of Eisler's action has become available to the Court now. Certainly petitioner and those in like case with him should not be required to serve jail sentences until the question has been finally determined.

5. Petitioner also suggests that the problem arising under the Fourth Amendment in relation to the relevancy of the material subpoenaed is important and far-reaching and requires determination by this Court.

Petitioner refused to furnish the list of contributors to the National Federation for Constitutional Liberties because he believed that such list was not relevant to any conceivable inquiry which the committee was authorized to make under the resolution which created it. Nothing has ever been established to the contrary. Petitioner's refusal was, as he explained to the committee (Ex. 14, R. 205), motivated by his fear that the committee would publish the list of contributors and, because it had expressed an unfavorable opinion with regard to the organization itself, smear them in the public mind. These fears had a solid foundation in the experience of others with this Committee (see Ex. 6, R. 179). The consequences of the deci-

sion in this case, if it is allowed to stand, will be that people will be afraid to join or contribute to any organization whose activities are of such a character that it might conceivably come within the unfavorable scrutiny of any legislative committee. The consequences to freedom of association are incalculable.

It should be borne in mind that the committee was authorized to inquire into the diffusion of propaganda only of a certain kind, namely, propaganda which is un-American and subversive and which attacks the principle of the form of government as guaranteed by the Constitution. There was not the slightest evidence or even contention that any of the propaganda diffused by the Federation could be characterized by any of the terms used in the resolution. The Court of Appeals, while finding the propaganda involved in the *Morford* case to be of such character (176 F. (2d) 54), made no similar finding here. The most that it suggested was that the propaganda actually distributed might have been the means for "silent diffusion of subversive doctrines".

There was no evidence whatever for the gratuitous assumption in the opinion of the Court of Appeals on this subject. Without assuming that even such "silent diffusion" would justify the conclusion, we recapitulate:

It is conceded that the subpoena cannot be upheld unless the material called for was pertinent to the inquiry. The material called for can be pertinent to the inquiry only if it bears on the subject matter of the inquiry, namely, the diffusion of propaganda of a certain kind. There was no evidence or contention that the material distributed by the Federation was of that kind. The Court below, therefore, was constrained to invent a new doctrine of "silent diffusion" for which there is no justification whatever. It would be novel doctrine indeed if a person had to go to jail for not having obeyed a subpoena, the only justification for which is assumed and unproved "silent diffusion"—whatever that might mean. The vagueness of this concept itself is such as to require consideration of the subject

matter by this Court. How can a person ever establish that he or his organization has not engaged in activities of this illusive and ill-defined character? To permit conviction under such a standard would be a denial of due process.

Nor is there any basis for the assumption in the government's brief in opposition to the granting of the petition (p. 8) that it might be pertinent to the committee's inquiry to determine whether some of the Federation's funds were collected from Communists. This is putting the cart before the horse. The only inquiry which was relevant was the purpose to which the Federation put its funds. Absent, as there was here, any evidence that the purpose to which the Federation did put its funds came within the scope of the committee's authorized powers, an inquiry with regard to the supporters of the organization would prove nothing relevant to its inquiry. It would create guilt by association with a vengeance. It would taint the propaganda by one of the supposed sources of the funds obtained for its dissemination without regard to the character of the propaganda itself and would taint the other contributors in the same way.

The committee was authorized only to investigate the dissemination of propaganda of a certain kind. Here the record clearly shows that the propaganda distributed by the Federation did not come within the terms of the resolution. That should have been the end of the committee's interest in the Federation. To inquire into its financial records was wholly outside the scope of the resolution. To subpoena its records was an unlawful search and seizure prohibited by the Fourth Amendment to the Constitution. Certainly the issue is important and far-reaching. If this decision stands no organization will be safe from having imputed to it the possibly unpopular character of some of its contributors. Likewise, contributors and members of organizations advocating unpopular causes will be exposed to serious risks. Certainly the matter should not rest without full consideration by this Court.

Conclusion

To recapitulate: An agency of the Government makes an ex-parte finding, on undisclosed evidence, that a certain organization is a Communist front. A member of Congress repeats that statement under cloak of immunity. Several years later a committee of the Congress authorized to investigate the diffusion of propaganda of a particular character subpoenas the head of the organization. In so doing it relies solely on the speech of the member of Congress. The head of the organization testifies before the committee with regard to the activities of the organization and makes available to the committee all the literature distributed by that organization. None of this activity or literature is of a character such as to come within the scope of the committee's powers. The head of the organization refuses to make available a list of contributors to his organization because he believes that to do so would result in the smearing of innocent persons. He is thereafter convicted and sentenced to serve a jail sentence without any finding that the literature distributed by his organization or any of its activities came within the scope of the committee's powers. The conviction is affirmed solely on the theory that there was a possibility that the organization might have engaged in spreading subversive propaganda secretly and silently. Of this there is neither charge nor proof.

Yet this Court so far can see here no issue of freedom of press or association, no issue of due process, no issue of relevancy under the Fourth Amendment. We can only express our bewilderment.

Accordingly, petitioner respectfully asks this Court to reconsider its determination denying his application for a writ of certiorari. This application is made in good faith and not for the purpose of delay.

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April 20, 1950

APPENDIX

Extract from Minutes of Voir Dire

"Questions to Be Addressed to Government Workers

"G-1. In what department or service are you employed? (57)

"G-2. How long have you worked there?

"G-3. In connection with your work, have you been questioned about alleged subversive activities or persons or organizations engaged in such activities by any person in authority?

"G-4. Have you had any discussions with other employees on questions concerning subversive activities or persons or organizations engaged in such activities?

"G-5. Have you ever been questioned by your superiors or by persons in authority on alleged subversive activities or persons or organizations engaged in such activities?

"G-6. Have you ever been questioned by investigators of the Civil Service Commission?

"G-7. Have you ever been questioned by investigators of the Federal Bureau of Investigation?

"G-8. Have you ever been questioned by investigators of the Department of Justice?

"G-9. Have you ever been questioned by investigators of the department in which you work?

"G-10. Have you read or heard about the Presidential Executive Order which provides for the investigation and purge of Government workers for alleged disloyalty? (58)

"G-11. Have you discussed with anyone the Presidential Order on disloyalty?

"G-12. Do you know that at present a loyalty check of Government workers is being conducted pursuant to the Executive Order of the President?

"G-13. Do you know that in connection with such loyalty check, investigations of Government employees are being conducted?

"G-14. Do you know that in connection with such loyalty check, a Loyalty Review Board has been appointed and is functioning?

"G-15. Do you know that in connection with such loyalty check, the Attorney General of the United States has published a list of subversive groups and organizations which is used in connection with such checks?

"G-16. Have you read or seen the Attorney General's list in the newspapers or elsewhere?

"G-17. Have you discussed the organizations on that list with anyone?

"G-18. Pursuant to the Executive Order providing for a loyalty check of Government employees, the records and files of the House Committee on Un-American Activities are to be used in the investigation of Government employees. In view of that fact and the fact that the House Committee on Un-American (59) Activities initiated the proceedings which resulted in this trial, have you any fear that if you were required on the evidence in this case to acquit the defendant, that your action in so doing might prejudice you in any way in your Government employment?

"G-19. Would you have any fear, in view of the facts set forth in the previous question, if on the evidence you voted for acquittal, that such vote may be used against you in any way or subject you to any criticism or ridicule?

"G-20. Friendly or sympathetic association with persons or organizations engaged in alleged subversive activities is a ground for discharge under the President's Executive Order. In view of this fact, do you or do you not believe that because of the nature of this case, if you found the defendant not guilty on the evidence, you might jeopardize your employment by the Government?

"G-21. Would the fact of your employment by the Government influence you in any way in favor of the Government's side of the case and against the defendant?

"Note: The defense reserves the right to propound additional questions if any of the above questions are answered in the affirmative." (60)

* * * * * *

The Court. * * * I will re-state it, ladies and gentlemen of the prospective jury: Is any member of the prospective panel, or any (96) member of his immediate family, an employee of the Government or an applicant for a position with the Government?

Now, sir—we will go in the back row first—No. 4.

Juror Campbell (in seat No. 4). Campbell; I have an application filed.

The Court. What department?

Juror Campbell. Civil Service Commission.

The Court. Very well, sir.

And do you understand that this question now embraces you or your immediate family, Mr. Endres?

Juror Endres (in seat No. 8). Yes, sir—Joseph Endres, now employed at the General Accounting Office.

The Court. Yes, sir.

Juror Grassi (in seat No. 10). Orlando Grassi, now employed at the City Post Office.

Juror Hancock (in seat No. 12). Benjamin Hancock, District Government.

The Court. All right, sir.

Juror Hoffman. Gotthard Hoffman, Model Basin, Navy Department.

The Court. The next gentleman.

Juror Wallin. William L. Wallin, employed Department of Labor; wife employed by the War Department.

The Court. Yes, sir.

Juror Stark. R. J. Stark, United States Naval Research (97) Laboratory.

The Court. Yes, sir.

We excuse Mr. MacDonald on other grounds it isn't necessary to state.

Mr. Isserman. If your Honor please, we would like to get the name of the juror prior to this last one.

(To Juror Wallin:) Where are you employed?

Juror Wallin. The Department of Labor, and my wife is employed by the War Department.

The Court. All right, madam.

Juror Morris. Blanche E. Morris, Bureau of Engraving and Printing.

The Court. Yes.

Juror Miller. William E. Miller, Air Adjutant General's Office.

The Court. All right, sir.

Yes, ma'am?

Juror Wilkins. Norma Wilkins. I have an application in at the Bureau of Standards.

The Court. Is any member of the panel or a member of his immediate family associated with, or has any member been associated with, any agency, either public or private, engaged in the detection of law violations?

Mrs. Cryer is the sister of the Major and Superintendent of the Metropolitan Police Force. Is there anybody else? (98)

Yes, sir—Mr. Kelly?

Juror Kelly. I have a brother in the Metropolitan Police Department.

The Court. Are any members of the panel or members of their immediate family receiving pensions or other benefits from the Government or any of its agencies?

Mrs. Cryer?

Juror Cryer (in seat No. 6). I receive the pension on account of my husband being in World War One.

The Court. That is all in the box?

Juror Lattisaw. Alice Lattisaw—my son.

The Court. Yes, ma'am.

Juror Loeb. My sister receives disability from the Government.

The Court. What is your name?

Juror Loeb. Eleanor Loeb.

Juror Morris. Mrs. Morris—receives a pension from the United States Navy. (99)

* * * * * * *

The Court (to counsel): As to the first question, gentlemen, we have covered that.

Mr. Horsky. Yes, sir.

The Court. Do you desire to ask the second question, in view of the answers as to where they are actually employed —the length of time?

Mr. Isserman. Does your Honor ask whether we are going to withdraw that question?

The Court. I wonder if it would serve any purpose.

Mr. Isserman. We could agree to withdraw it, your Honor.

The Court. You do not desire that it be asked? (108)

Mr. Isserman. No.

The Court (to the panel). In connection with your work, have you been questioned about alleged subversive activities or persons or organizations engaged in such activities, by any person in authority? (No response.)

Have you had any discussions with other employees on questions concerning subversive activities or persons or organizations engaged in such activities?

Mr. Isserman. If the Court please, I am not quite sure that the members of the panel understand that is addressed especially to Government workers.

The Court. It is addressed especially to Government workers, and to all others, too.

Have you ever been questioned by your superiors or by persons in authority on alleged subversive activities or persons or organizations engaged in such activities? (Juror Carl stood.)

The Court. Mr. Carl.

Juror Carl. The same.

The Court. You have stated that for the record.

Juror Carl. Your Honor, I am referring to that——

The Court. You needn't say another thing, Mr. Carl. I didn't mean to be curt to you.

Juror Carl. I am not referring to the same thing I said. (109)

The Court. Come to the bench.

(At the bench:)

The Court (to Juror Carl). The reason I do that is if you had heard something these other jurors had not heard, it may put something in their minds they don't know about.

Juror Carl. Yes, sir; that is perfectly all right.

The Court. Yes, sir?

Juror Carl. I am referring to an occasion I was called in in an investigation during the summer time, at the Naval Laboratory.

The Court. Yes, sir.

Juror Carl. But I don't know what connection that has with subversive activities. There was a suspected case of sabotage.

Mr. Isserman. Did you work on that case?

Juror Carl. I was working at the Naval Observatory. After I left, somebody took over the work I was working on, and put some rouge in the bearing of one of these time signal transmitters; and I was called in on the investigation of this rouge appearing in the time signal transmitter.

Mr. Isserman. Were you a witness, or did you investigate it?

Juror Carl. No; they called me in to ask a question about it. And it occurred two or three months after I had left. It had nothing to do with me; but they questioned me (110) on how it could possibly have gotten in it.

The Court. You being an expert in that particular field?

Juror Carl. I was working there at the time on this time signal transmitter.

The Court. All right; thank you, Mr. Carl.

(Counsel having returned to the trial table and Juror Carl having returned to his seat, No. 5, in the box.)

The Court. Have you ever been questioned by investigators of the Civil Service Commission? (No response.)

Have you ever been questioned by investigators of the Federal Bureau of Investigation? (No response.)

By the Department of Justice? (No response.)

Have you ever been questioned by investigators of the department in which you work? (No response.)

Have you read or heard about the Presidential Executive Order which provides for the investigation of Government workers for alleged disloyalty? (No response.)

Have you discussed with anyone the Presidential Order on disloyalty? (No response.)

Do you know whether a loyalty check of Government workers is being conducted pursuant to the Executive Order of the President? (Juror Endres stood.)

Mr. Endres, come to the bench, please.

(At the bench:)

The Court. This is Mr. Endres. Yes, sir; what is the (111) situation?

Juror Endres. They have had a loyalty check at the General Accounting Office, to all employees. We filled out a form.

The Court. You did, sir?

Juror Endres. Yes, sir.

The Court. Then your answer is that you do know there was a loyalty check, through that form?

Juror Endres. Yes, your Honor.

The Court. Is that all you know about it?

Juror Endres. Yes, sir.

The Court. (To counsel:) Is there something else you would like to ask him?

Mr. Isserman. There are some other questions, your Honor.

The Court. Since he is here now, if there is anything you would like to ask him individually, you may.

Mr. Isserman. I would like to ask him whether in connection with the check he has any fear he might be prejudiced by any decision he might make in this case.

The Court. Yes.

Juror Endres. No, I would have no fear.

The Court. You would have no fear of what might happen to you in the department?

Juror Endres. No, sir. (112)

The Court. (To counsel:) Do you have anything else?

Mr. Murray. I have nothing.

Mr. Isserman. Did you know there was a subversive list published in connection with this loyalty check, of certain organizations?

Juror Endres. If there was such a list, they didn't show it to the employees.

Mr. Isserman. You don't know anything about such a list?

Juror Endres. No, sir.

The Court. Is that all?

Mr. Isserman. Yes, sir.

The Court. All right; thank you, Mr. Endres.

(Counsel having returned to the trial table and Juror Endres having returned to his seat, No. 8, in the box:)

The Court. (To the panel:) Do you know whether in connection with such loyalty check the Attorney General of the United States has published a list of subversive groups and organizations which is used in connection with such checks? (No response.)

Have you read or seen the Attorney General's list in the newspapers or elsewhere? (No response.)

(To counsel:)And the next one will be eliminated, gentlemen.

Mr. Isserman. Yes, sir.

The Court. I will ask you ladies and gentlemen to pay (113) particular attention to this question—not that you haven't paid attention to the others:

Would the fact of your employment by the Government influence you in any way in favor of the Government's side of this case and against the defendant? (No response.)

Does any reason occur to any one of you why you could not sit in this case and render your verdict solely on the evidence adduced from the witness stand and the law as given you by the Court, without favor toward the defendant or prejudice toward the defendant, or favor to the Government or prejudice to the Government?

Juror Stichman. Your Honor, as stated before.

The Court: Yes, you have stated it before.

Mr. Isserman. May I call your Honor's attention to the second half of G-18?

The Court. Yes, sir; and you have correctly called my attention to it.

(To the panel:) Have you any fear that if you were required on the evidence in this case to acquit the defendant, that your action in so doing might prejudice you in any way in your Government employment or otherwise? (No response.) (114)

* * * * * *

(At the bench:)

Mr. Isserman. We would like to challenge Mr. Carl, for cause, on the ground that he has formed an opinion about the committee and its work, which would indicate necessarily he would be against the defendant in this case.

The Court: All right; I will do it.

(To Mr. Murray:) You don't have any objection?

Mr. Murray. No, sir.

Mr. Isserman. And, to save coming up again, Mr. Stichman.

The Court. Yes.

(To Mr. Murray:) There is no objection?

Mr. Murray. No, sir. (117)

* * * * * *

Mr. Isserman. I would like to exercise a peremptory challenge in the case of Juror No. 8, if the Court please.

The Court. Very well.

The Deputy Clerk. Joseph E. Endres, you are excused from serving on this panel. (120)

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